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CANADIAN RAILWAY CASES.

CONTAINING

A SELECTION OF CASES AFFECTING RAILWAYS RECENTLY DECIDED BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, THE SUPREME COURT AND THE EXCHEQUER COURT OF CANADA, AND THE COURTS OF THE PROVINCES OF CANADA, INCLUDING DECISIONS OF THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA, PUBLISHED BY AUTHORITY OF THE BOARD, WITH NOTES AND COMMENTS.

BY

ANGUS MACMURCHY

AND

SHIRLEY DENISON

OF OSGOODE HALL, TORONTO,
BARRISTERS-AT-LAW.

VOLUME VII.

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TABLE OF CONTENTS.

Addenda et Corrigenda iv
Table of Cases Reported v
Table of Cases Cited ix
Railway Crossings—Signals—Contributory Negligence 1
Fences—Cattle—Owner's Negligence 4
Animals at Large—Negligence of Owner—Evidence 29
Absence of Duty to Fence 34
Cattle Killed on Railway—Owner's Negligence 41
Farm Crossing—Agreement—Railway Commissioners 47
Cattle Killed on Track—Farm Crossings 60
Highway Crossing—Gates and Watchman 65
Conveyance by Life Tenant 71
Highway Crossing—Apportionment of Costs of Protection. 73
Cost of Making 79
Expropriation—Contractual Relationship 90
Location—Deviation 96
Jurisdiction of the Board—Location—Priority 109
Competitive Rates—Unjust Discrimination 125
Fire—Operation of Railway—Negligence 150
Fires—Damages by Reason of Railway 156
Constitutional Law—Fires—Special Legislation 164
Prairie Fires Ordinance 176
Highway Crossing—Absence of Approval 195
Employers' Liability Act—Common Employment 198
Negligence—Contributory Negligence—New Trial 210
Street Railway 218
Insulation of Electric Wires 252
Warrant for Possession—Costs—Practice 257
Lands—Possession—Mandamus 258
Tariff—Special Passenger Rates—Approval 263
Passenger Tolls—Third-class Fares 267
Highway Crossings—Cost of Protection 274
Through Rates—Continuous Route 289
Railway Crossing—Double Track—Priority 294
Location—Priority 297
Joint Switching Rates—Joint Tariffs 302
Arbitration—Setting Aside Award 336
Fences—Animals at Large 345

Digitized by Google

Transfer of Shares—Mandamus..... 367
Negligence—Condition—Notice of Claim..... 374
Highway Crossing—Negligence—Nonsuit..... 380
Highway—Backing Train—Signals 401
Street Railway—Negligence—Appeal 408
New Trial 419
Station Road—Signals—Negligence 429
Railway Crossing—Collision—Negligence 444
Constitutional Law—Contracting Out..... 472
Digest of Cases..... 477
Index to Notes 517

ADDENDA ET CORRIGENDA.

Page 195, insert head note for *Bird* v. *Canadian Pacific R.W. Co.*:—The crossing where the accident took place was opened by the railway company across their tracts without leave of the Board. This crossing had never been recognized by the municipality as a public highway who had always insisted that a crossing should be made on the public highway further east and an application was pending to the Board at the time of the accident to compel this to be done:—

Held, that as the Board had not sanctioned the opening of the crossing, it was not therefore a public highway under the Railway Act, and the defendants were under no obligation to fence it under section 242.

Re Reid and Canada Atlantic R.W. Co., 4 Can. Ry. Cas. 272, followed.

Page 1, last line, head note, for "existence" read "non-existence."

Page 252, line 2, head note, for "same work" read "work."

Page 344, line 5, for "respondents" read "appellants."

Page 136, vol. 6, at end of line 4 insert "would have the effect of creating an easement over property."

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TABLE OF CASES REPORTED.

Attorney-General for Canada, Grand Trunk R.W. Co. v., (1907) A.C. 65 472

Becker v. Canadian Pacific R.W. Co., 5 West. L.R. 569.... 29
Biddeson v. Canadian Northern R.W. Co., (Unreported).. 17
Bird v. Canadian Pacific R.W. Co., 6 West. L.R. 393..... 195
Blue, Red Mountain R.W. Co. v., 39 S.C.R. 390..... 150
Bourassa v. Canadian Pacific R.W. Co., Q.R. 30 S.C. 385.. 41
British Columbia Pacific Coast Cities v. Canadian Pacific R.W. Co. 125
Byrne, Re Canadian Pacific R.W. Co. and, 15 O.L.R. 45... 71

Canadian Freight Association, Canadian Manufacturers' Association v. 302
Canadian Manufacturers' Association v. Canadian Freight Association. 302
Canadian Northern R.W. Co., Biddeson v., (Unreported).. 17
Canadian Northern R.W. Co. v. Canadian Pacific R.W. Co.. 297
Canadian Northern R.W. Co., Carr v., 17 Man. L.R. 178.... 258
Canadian Northern R.W. Co., Clayton v., 17 Man. L.R. 426. 355
Canadian Northern R.W. Co. v. Grand Trunk & Canadian Pacific R.W. Cos. 289
Canadian Pacific R.W. Co. v. Becker, 5 West. L.R. 569..... 29
Canadian Pacific R.W. Co., Bird v., 6 West. L.R. 393..... 195
Canadian Pacific R.W. Co., Bourassa v., Q.R. 30 S.C. 385.. 41
Canadian Pacific R.W. Co., British Columbia Pacific Coast Cities v. 125
Canadian Pacific R.W. Co. and Byrne, Re, 15 O.L.R. 45.... 71
Canadian Pacific R.W. Co., Canadian Northern R.W. Co. v.. 297
Canadian Pacific R.W. Co. v. Carruthers, 39 S.C.R. 251.... 23
Canadian Pacific R.W. Co. v. City of Toronto, (Unreported) 274
Canadian Pacific R.W. Co., City of Toronto v., (1908) A.C. 54. 282
Canadian Pacific R.W. Co., Cortese v., 13 B.C.R. 322..... 345
Canadian Pacific R.W. Co., Grand Trunk Pacific R.W. Co. v. 299
Canadian Pacific R.W. Co., Hanna v., See 11 O.W.R. 1069.. 392
Canadian Pacific R.W. Co. v. Hansen, 40 S.C.R. 194..... 441
Canadian Pacific R.W. Co., Hansen v., See 4 West. L.R. 385 429

Digitized by Google

Canadian Pacific R.W. Co. v. The King, 39 S.C.R. 476..... 176
Canadian Pacific R.W. Co., McDaniel v., 13 B.C.R. 49..... 34
Canadian Pacific R.W. Co., Moir v., See 10 O.W.R. 414.... 380
Canadian Pacific R.W. Co., Murray v., 7 West. L.R. 50.... 351
Canadian Pacific R.W. Co., Northern Counties Investment Trust v., 13 B.C.R. 130..... 164
Canadian Pacific R.W. Co., Pedlar v., 6 West. L.R. 201.... 1
Canadian Pacific R.W. Co., Sheppard v., 16 O.L.R. 259.... 374
Canadian Pacific & Grand Trunk R.W. Cos., Village of Weston v. 79
Carr v. Canadian Northern R.W. Co., 17 Man. L.R. 178... 258
Carruthers, Canadian Pacific R.W. Co. v., 39 S.C.R. 251.. 23
Cedar Dale, Village of, Grand Trunk R.W. Co. v.. 73
Chatham, Wallaceburg & Lake Erie R.W. Co., Robertson v.. 96
Clayton v. Canadian Northern R.W. Co., 17 Man. L.R. 426. 355
Coen v. New Westminster Southern R.W. Co., 5 West. L.R. 214 60
Cortese v. Canadian Pacific R.W. Co., 13 B.C.R. 322..... 345

Dickie v. Grand Trunk R.W. Co., 14 O.L.R. 671..... 47

Eckardt v. Grand Trunk R.W. Co..... 90
Essex Terminal R.W. Co. v. Windsor, Essex & Lake Shore Rapid R.W. Co. 109

Fortin, Quebec Railway, Light & Power Co. v., 40 S.C.R. 181 252

Grand Lodge of Knights of Pythias v. Great Northern R.W. Co., See 6 West. L.R. 425..... 263
Grand Trunk R.W. Co. v. Attorney-General for Canada, (1907) A.C. 65..... 472
Grand Trunk & Canadian Pacific R.W. Cos., Canadian Northern R.W. Co. v. 289
Grand Trunk R.W. Co., Dickie v., 14 O.L.R. 671..... 47
Grand Trunk R.W. Co., Eckhardt v. 90
Grand Trunk R.W. Co., Lamond v., 16 O.L.R. 365..... 401
Grand Trunk R.W. Co., McKenzie v., 14 O.L.R. 671..... 47
Grand Trunk R.W. Co. v. Robertson, 39 S.C.R. 506..... 267
Grand Trunk R.W. Co. v. United Counties R.W. Co..... 294
Grand Trunk R.W. Co. v. Village of Cedar Dale..... 73
Grand Trunk R.W. Co., Yeates v., 14 O.L.R. 63..... 4

Digitized by Google

Grand Trunk Pacific R.W. Co. v. Canadian Pacific R.W. Co. 299
Great Northern R.W. Co., Grand Lodge of Knights of Pythias v., See 6 West. L.R. 425 263

Hanna v. Canadian Pacific R.W. Co., See 11 O.W.R. 1069.. 392
Hansen v. Canadian Pacific R.W. Co., See 4 West. L.R. 385. 429
Hansen, Canadian Pacific R.W. Co. v., 40 S.C.R. 194..... 441
Hinsley v. London Street R.W. Co., 16 O.L.R. 350..... 419

King, The, Canadian Pacific R.W. Co. v, 39 S.C.R. 476... 176
King, Toronto R.W. Co. v., (1908) A.C. 260..... 408

Lamond v. Grand Trunk R.W. Co., 16 O.L.R. 365..... 401
London Street R.W. Co, Hinsley v., 16 O.L.R. 350..... 419
Lumsden v. Temiskaming & Northern Ontario Railway Commission, 15 O.L.R. 469..... 156

McDaniel v. Canadian Pacific R.W. Co., 13 B.C.R. 49..... 34
McKay v. Wabash R.W. Co.. (Unreported)..... 444
McKay, Wabash R.W. Co. v.. 40 S.C.R. 251..... 466
McKenzie v. Grand Trunk R.W. Co., 14 O.L.R. 671..... 47
McMullin v. Nova Scotia Steel & Coal Co., 39 S.C.R. 593.. 198
Milsted, Re Vancouver, Victoria & Eastern R.W. & Nav. Co., and, 15 B.C.R. 187..... 257
Moir v. Canadian Pacific R.W. Co., See 10 O.W.R. 414.... 380
Murray v. Canadian Pacific R.W. Co., 7 West L.R. 50..... 351

Nelles v. Windsor, Essex & Lake Shore Rapid R.W. Co., 16 O.L.R. 359 367
New Westminster Southern R.W. Co.. Coen v., 5 West. L.R. 214 60
Northern Counties Investment Trust v. Canadian Pacific R.W. Co., 13 B.C.R. 130..... 164
Nova Scotia Steel & Coal Co., McMullin v., 39 S.C.R. 593... 198

Pedlar v. Canadian Pacific R.W. Co., 6 West. L.R. 201.... 1

Quebec Bridge & R.W. Co., Quebec Improvement Co. v., (1908) A.C. 217..... 336
Quebec Improvement Co. v. Quebec Bridge & R.W. Co., (1908) A.C. 217 336
Quebec Railway, Light & Power Co. v. Fortin. 40 S.C.R. 181 252

Digitized by Google

Red Mountain R.W. Co. v. Blue, 39 S.C.R. 390..... 150
Robertson v. Chatham, Wallaceburg & Lake Erie R.W. Co.. 96
Robertson, Grand Trunk R.W. Co. v., 39 S.C.R. 506..... 267

Sheppard v. Canadian Pacific R.W. Co., 16 O.L.R. 259.... 374
Simpson v. Toronto & York Radial R. W.Co., 16 O.L.R. 31.. 218
Soulsby v. City of Toronto, 15 O.L.R. 13..... 65

Temiskaming & Northern Ontario Railway Commission, Lumsden v., 15 O.L.R. 469 156
Toronto, City of, v. Canadian Pacific R.W. Co., (1908) A.C. 54 282
Toronto, City of, Soulsby v., 15 O.L.R. 13..... 65
Toronto R.W. Co. v. King, (1908) A.C. 260..... 408
Toronto & York Radial R.W. Co., Simpson v., 16 O.L.R. 31. 218

United Counties R.W. Co., Grand Trunk R.W. Co. v.,.... 294

Vancouver, Victoria & Eastern R.W. Co., and Milsted, Re, 13 B.C.R. 187 257

Wabash R.W. Co. v. McKay, 40 S.C.R. 251..... 466
Wabash R.W. Co., McKay v., (Unreported) 444
Weston, Village of, v. Canadian Pacific & Grand Trunk R.W. Cos. 79
Windsor, Essex & Lake Shore Rapid R.W. Co., Essex Terminal R.W. Co. v. 109

Yeates v. Grand Trunk R.W. Co., 14 O.L.R. 63..... 4

Digitized by Google

CASES CITED.

Aerketz v. Humphreys.....145 U.S.R. 418 200
Ætna Insurance Co. v. Brodie.....Cass. Dig. (2 ed.) 673, Cout. Dig. 1099. 151
Allen v. North Metropolitan Tramways Co. .....4 T.L.R. 561 411
Anderson v. Canadian Pacific R.W. Co. .....17 O.R. 747 169
Andreas v. Canadian Pacific R.W. Co.37 S.C.R. 1, 5 Can. Ry. Cas. 440, 450. 347
Angell v. Duke.....L.R. 10 Q.B. 174 12
Armstrong and James Bay R.W. Co., Re .....12 O.L.R. 137, 38 S.C.R. 511, 5 Can. Ry. Cas. 306, 6 Can. Ry. Cas. 196. 344
Arthur v. Central Ontario R.W. Co..11 O.L.R. 537, 5 Can. Ry. Cas. 318. 35
Attorney-General for Ontario v. Attorney-General for Canada.....(1896) A.C. 348 284
Attorney-General for Ontario v. Attorney-General for Canada.....(1894) A.C. 189 473
Attorney-General v. Tomline .....7 Ch D. 388 91
Auger v. Ontario, Simcoe & Huron R.W. Co. .....9 U.C.C.P. 164 174

Bacon v. Grand Trunk R.W. Co.....12 O.L.R. 196, 5 Can. Ry. Cas. 325. .....5, 35, 346
Banco de Portugal v. Waddell.....5 App. Cas. 161 151
Barrett v. Canadian Pacific R.W. Co.16 Man. L.R. 549, 558, 6 Can. Ry. Cas. 356, 364 258
Baxter v. Jones.....6 O.L.R. 360 69
Benedict v. Minneapolis & St. Louis R.W. Co. .....90 N.W. Rep. 360, 86 Minn. 224. 226
Bennett v. Grand Trunk R.W. Co...3 O.R. 446 407
Bernina, The .....12 P.D. 58, 13 App. Cas. 1..... 427
Blackwood v. Regina .....8 App. Cas. 82 190
Blain v. Canadian Pacific R.W. Co...5 O.L.R 334, 2 Can. Ry. Cas. 69, 85 440
Blakemore v. Glamorganshire Canal Co. .....3 Y. & J. 60 170
Bodwell v. McNiven.....5 O.L.R. 322 258
Booth v. Canadian Pacific R.W. Co..5 Can. Ry. Cas. 389 379
Boston Chamber of Commerce v. Lake Shore & Michigan Southern R.W. Co. .....1 I.C.C. Rep. 436 133
Bourgoin v. La Compagnie du Chemin de Fer de Montreal .....19 S.C.R. 180 338
Bradburn v. Great Western R.W. Co.L.R. 10 Ex. 1 476
Bramston v. Colchester .....6 E. & B. 246 269
Branch Lines, In re, (Canadian Pacific R.W. and James Bay R.W. Cos.) .....33 S.C.R. 42 302
Breakey v. Carter .....4 Q.L.R. 332 339
Brenner v. Toronto R.W. Co.....13 O.L.R. 423, 15 O.L.R. 195, 6 Can. Ry. Cas. 261 422

Digitized by Google

Bridges v. Jackson Electric R.W., Light & Power Co. ..... 38 So. Rep. 788, 139 Am. & Eng. R.R. Cas. (N.S.) 225... 512
Bridges v. North London R.W. Co... L.R. 7 H.L. 213 364
Brown v. Grand Trunk R.W. Co.... 24 U.C.R. 350 169
Brown v. London Street R.W. Co... 2 O.L.R. 53, 31 S.C.R. 642, 1 Can. Ry. Cas. 385, 390 422
Brown v. McMillan ..... 7 M. & W. 196 270
Brown v. Northern Ohio Traction Co. 10 L.R.A., N.S. 421 422
Brown v. Toronto & Nipissing R.W. Co. ..... 26 U.C.C.P. 206 53
Browne v. Brockville & Ottawa R.W. Co. ..... 20 U.C.R. 202 169
Bulmer v. Brumwell ..... 13 A.R. 411 6
Burnt District Case ..... 4 Can. Ry. Cas. 290 90
Burton v. Corporation of Salford... 11 Q.B.D. 286 170
Burton Stock Car Co. v. Chicago Burlington & Quincy R.W. Co..... 1 I.C.C. Rep. 132 139
Buskey v. Canadian Pacific R.W. Co. 11 O.L.R. 1, 5 Can. Ry. Cas. 384 379
Butterly v. Mayor of Drogheda..... (1907) 2 Ir. R. 134 422

Canada Atlantic R.W. Co. v. Henderson ..... 29 S.C.R. 632 209
Canada Southern R.W. Co. v. Jackson. ..... 17 S.C.R. 316 ..... 194, 209
Canadian Pacific R.W. Co. v. Blain.. 34 S.C.R. 74, 36 S.C.R. 159, 3 Can. Ry. Cas. 143, 4 Can. Ry. Cas. 429 440
Canadian Pacific R.W. Co. v. Boisseau. ..... 11 Q.O.R. 394, 32 S.C.R. 424, 2 Can. Ry. Cas. 335 406
Canadian Pacific R.W. Co. and County and Township of York, In re ..... 27 O.R. 559, 25 A.R. 65, 1 Can. Ry. Cas. 36, 47.....73, 274, 283
Canadian Pacific R.W. Co. v. Eggleston. ..... 36 S.C.R. 641 ..... 35, 64
Canadian Pacific R.W. Co. v. Grand Trunk R.W. Co. ..... 12 O.L.R. 320, 5 Can. Ry. Cas. 400 277
Canadian Pacific R.W. Co. v. Guthrie. 27 A.R. 64, 31 S.C.R. 155, 1 Can. Ry. Cas. 1, 9 54
Canadian Pacific R.W. Co. v. Lawson. Court. Dig. 12 467
Canadian Pacific R.W. Co. v. Notre Dame de Bonsecours ..... (1899) A.C. 367 ..... 177, 473
Cannon Falls v. Chicago & Great Western R.W. Co. ..... 10 I.C.C. Rep. 650 128
Carew v. Grand Trunk R.W. Co..... 5 O.L.R. 653, 2 Can. Ry. Cas. 241 54
Carlill v. Carbolic Smoke Ball Co... (1893) 1 Q.B. 256 258
Carpue v. London & Brighton R.W. Co. ..... 5 Q.B. 747 169
Carroll v. Great Western R.W. Co... 14 U.C.R. 614 54
Carty v. City of London..... 18 O.R. 122 169
Catawissa R.W. Co. v. Armstrong... 49 Penn. 186 227
Charnock v. Merchant ..... (1900) 1 Q.B. 474 269

Digitized by Google

Chicago & Milwaukee Electric R.W. Co. v. Illinois Central R.W. Co. 13 I.C.C. Rep. 20 292
Christensen v. Metropolitan Street R.W. Co. ..... 137 Fed. Rep. 708, 41 Am. & Eng. R.R. Cas. (N.S.) 250 228
Christie and Toronto Junction, In re. 22 A.R. 21 395
Cincinnati, Freight Bureau of, v. Cincinnati, New Orleans & Texas Pacific R.W. Co. ..... 7 I.C.C. Rep. 180 128
Clabon v. Lawdry. ..... 2 M.M.C. 38 37
Clarke v. Bradlaugh ..... 8 Q.B.D. 63 166
Clayton v. Great Western R.W. Co. 23 U.C.C.P. 137 5
Coghlan v. Cumberland..... (1898) 1 Ch. 704 395
Colonial Bank of Australasia v. Willan ..... L.R. 5 P.C. 417 184
Confederation Life Association v. O'Donnell ..... 10 S.C.R. 92 151
Conger v. Grand Trunk R.W. Co..... 13 O.R. 160 169
Connecticut Mutual Life Insurance Co. v. Moore ..... 6 App. Cas. 644 411
Corry v. Great Western R.W. Co.... 6 Q.B.D. 237, 7 Q.B.D. 322.... 14
Costello v. Grand Trunk R.W. Co... 7 O.W.R. 846 379
Cox v. English, Scottish & Australian Bank. ..... (1905) A.C. 168 364
Coyle v. Great Northern R.W. Co.... L.R. 20 Ir. 409 394
Crafter v. Metropolitan R.W. Co.... L.R. 1 C.P. 300 442
Crawford v. Provincial Insurance Co. 8 U.C.C.P. 263 371
Crowe v. New York Central & Hudson River R.W. Co. ..... 70 Hun. 37 200
Cuckfield, Re ..... 19 Beav. 153 270
Cummings v. Worcester, Leicester & Spencer Street R.W. Co..... 166 Mass. 220 226
Curran v. Grand Trunk R.W. Co..... 25 A.R. 407 199
Cushing v. Dupuy ..... 5 App. Cas. 409 473

Dahlberg v. Minneapolis Street R.W. Co. ..... 32 Minn. 404 226
Danger v. London Street R.W. Co... 30 O.R. 496 356
Daw v. Metropolitan Board of Works. 31 L.J.C.P. 223..... 269
Dawson. Board of Trade of, v. Central Georgia R.W. Co. ..... 8 I.C.C. Rep. 142 128
De Lassalle v. Guildford ..... (1901) 2 K.B. 215..... 12
Dixon v. Great Western R.W. Co..... (1897) 1 Q.B. 300 14
Dolsen, Re ..... 13 P.R. 84 71
Dominion Iron & Steel Co. v. Oliver. 35 S.C.R. 517 200
Dougherty v. Williams ..... 32 U.C.R. 215 231
Dublin, Wicklow & Wexford R.W. Co. v. Slattery ..... 3 App. Cas. 1155 411
Duke of Marlborough's Parliamentary Estates, In re ..... 8 T.L.R. 179 269
Dun v. Seaboard & Roanoke R.W. Co.. 78 Va. 645 233
Duncan v. Scottish North Eastern R.W. Co. ..... L.R. 2 H.L. Sc. 20..... 269
Dunsford v. Michigan Central R.W. Co. ..... 20 A.R. 577 5

Elliott v. Buffalo & Lake Huron R.W. Co. ..... 16 U.C.R. 289 54

Digitized by Google

Elliott v. Chicago, Milwaukee & St. Paul R.W. Co. ....150 U.S.R. 245 ....394, 411
Ellis v. Great Western R.W. Co. ....L.R. 9 C.P. 551 394
Erskine v. Adeane ....L.R. 8 Ch. 756 6
Exchange Bank v. Gilman ....17 S.C.R. 108 151
Export and Domestic Rate Case ....8 I.C.C. Rep. 214 132

Fahner v. Brooklyn Heights R.W. Co.86 App. Div. (N.Y.) 488.... 233
Farmer v. Grand Trunk R.W. Co....21 O.R. 299 233
Favre v. Louisville & Nashville R.W. Co. ....16 S.W. Rep. 370, 91 Ky. 541.. 225
Fenna v. Clare & Co. ....(1895) 1 Q.B. 199 234
Fenson v. Canadian Pacific R.W. Co.8 O.L.R. 688, 2 Can. Ry. Cas. 376, 3 Can. Ry. Cas. 231, 4 Can. Ry. Cas. 76 169
Fitzpatrick v. Casselman ....29 U.C.R. 5 231
Follis v. Port Hope, etc., R.W. Co...9 U.C.C.P. 50 168
Fraser v. Drew ....30 S.C.R. 241 395

Gaby v. Wiltshire Canal Co....3 M. & S. 580 170
Garnett v. Bradley ....3 App. Cas. 944 173
Garrioch v. McKay ....13 Man. L.R. 405 356
Gaslight & Coke Co. v. Hardy....17 Q.B.D. 619 170
Gelinas v. Clark ....8 B.C.R. 42 36
Germantown Passenger R.W. Co. v. Brophy ....105 Pa. 38 226
Goodwin v. Sheffield ....(1902) 1 K.B. 629 270
Graham v. Commissioners for Queen Victoria Niagara Falls Park ....28 O.R. 1 ....67, 160
Graham v. Mayor, etc., of Newcastle-upon-Tyne ....(1893) 1 Q.B. 643 170
Grand Trunk R.W. Co. v. City of Kingston ....8 Ex. C.R. 349, 4 Can. Ry. Cas. 102 73
Grand Trunk R.W. Co. v. City of Toronto ....32 O.R. 120, 1 Can. Ry. Cas. 82. 89
Grand Trunk R.W. Co. v. McKay...34 S.C.R. 81, 3 Can. Ry. Cas. 52 196
Grand Trunk R.W. Co. v. Perrault..36 S.C.R. 671, 5 Can. Ry. Cas. 293 ....5, 54, 196
Grand Trunk R.W. Co. v. Rainville..28 O.R. 625, 25 A.R. 242, 29 S.C.R. 201, 1 Can. Ry. Cas. 113, 117, 125 168
Grand Trunk R.W. Co. v. Valliear..7 O.L.R. 364, 2 Can. Ry. Cas. 245, 3 Can. Ry. Cas. 399.... 54
Great Western R.W. Co. v. Baby....12 U.C.R. 106 338
Great Western R.W. Co. v. Severn & Wye & Severn Bridge R.W. Co....5 Ry. & C. Tr. Cas. 170.... 291
Great Western R.W. Co. v. Sutton..L.R. 4 H.L. 226 127
Great Western R.W. Co. v. Vilaire...11 U.C.C.P. 509 5
Groves v. Wimborne ....(1898) 2 Q.B. 402 198
Guest v. Poole Bournemouth R.W. Co.L.R. 5 C.P. 553 263

Hainer v. Grand Trunk R.W. Co....36 S.C.R. 180, 5 Can. Ry. Cas. 59. 394
Hammersmith & City R.W. Co. v. Brand ....L.R. 4 H.L. 171 170
Handy v. Carruthers ....25 O.R. 279 6

Digitized by Google

Haynes v. Haynes ..... 1 Dr. & Sm. 426 91
Hayward v. Canadian Northern R.W. Co. ..... 16 Man. L.R. 158, 6 Can. Ry. Cas. 411 ..... 377, 379
Headland v. Coster ..... (1905) 1 K.B. 219 167
Henderson v. Arthur ..... (1907) 1 K.B. 10 12
Heseltine v. Simmons ..... (1892) 2 Q.B. 547 12
Hicks v. Newport, Abergavenny & Hereford R.W. Co. ..... 4 B. & S. 403n. 467
High River et al. v. Canadian Pacific R.W. Co. ..... 6 Can. Ry. Cas. 344 ..... 82, 89
Hilton Lumber Co. v. Wilmington & Weldon R.W. Co. ..... 9 I.C.C. Rep. 17 128
Hodge v. The Queen ..... 9 App. Cas. 117 473
Holbrook v. Utica & Schenectady R. W. Co. ..... 12 N.Y. (Kernan) 236 233
Holland v. Northwick Highway Board. 34 L.T.N.S. 137 170
Hollinger v. Canadian Pacific R.W. Co. ..... 20 O.R. 244 209
Houston v. McLaren ..... 14 A.R. 103 6
Huber v. Cedar Rapids & M.C. R.W. Co. ..... 35 Am. & Eng. R.R. Cas. (N.S.) 768, 100 N.W. Rep. 478 225
Huddersfield v. Lister & Son ..... (1895) 2 Ch. 273 91
Hugo v. Great Western R.W. Co. .... 16 U.C.R. 506 54

Ibbottson v. Henry ..... 8 O.R. 625 358
Indianapolis & Cincinnati R.W. Co. v. Rutherford ..... 29 Ind. 82 227
Interstate Commerce Commission v. Alabama Midland R.W. Co. ..... 168 U.S.R. 145 130
Interstate Commerce Commission v. Baltimore & Ohio R.W. Co. ..... 145 U.S.R. 263 127
Interstate Commerce Commission v. Louisville & Nashville R.W. Co. .. 190 U.S.R. 273 130
Interurban Railway & Terminal Co. v. Hancock. ..... 78 N.E. Rep. 964 233

James v. Dominion Express Co. ..... 13 O.L.R. 211, 6 Can. Ry. Cas. 309 378
James & Abbott v. East Tennessee, Virginia & Georgia R.W. Co. ..... 3 I.C.C. Rep. 225 138
James Bay R.W. Co. v. Grand Trunk R.W. Co. (Gamebridge Case) .... 37 S.C.R. 372, 5 Can. Ry. Cas. 164 296
Jennings v. Grand Trunk R.W. Co. .. 13 App. Cas. 800 446
Johnston v. Chicago, St. Paul, Minneapolis & Omaha R.W. Co. ..... 9 I.C.C. Rep. 221 128
Johnston v. Northern R.W. Co. ..... 34 U.C.R. 432 3
Jordon v. McMillan ..... 8 B.C.R. 27 37

Kearney v. Oakes ..... 18 S.C.R. 148 159
Keith v. Ottawa & New York R.W. Co. ..... 3 O.L.R. 256, 5 O.L.R. 116, 2 Can. Ry. Cas. 23, 26 229
Kelly v. Ottawa Street R.W. Co. ..... 3 A.R. 616 169
Kent v. Great Western R.W. Co. ..... 16 L.J.C.P. 72 170

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Kilmer v. Great Western R.W. Co...35 U.C.R. 595 6
Kindal v. Atchison, Topeka & Santa Fe R.W. Co. .....9 I.C.C. Rep. 106 128
Kingston, City of, v. Kingston, Portsmouth & Cataraqui Electric R.W. Co. . . . .25 A.R. 462 263
Knill v. Grand Trunk R.W. Co.....8 O.W.R. 870 54

Laning-Harris Coal & Grain Co. v. Atchison, Topeka & Santa Fe R.W. Co. . . . .12 I.C.C. Rep. 479 304
Lees v. Ottawa & New York R.W. Co.31 O.R. 567 263
Lehmann, Higginson & Co. v. Central Pacific R.W. Co. .....4 I.C.C. Rep. 1 138
Le May v. Canadian Pacific R.W. Co.17 A.R. 293 199
Leonard v. Chicago, Milwaukee & St. Paul R.W. Co. .....12 I.C.C. Rep. 492 305
Levesque v. New Brunswick R.W. Co.29 N.B.R. 588 169
Little Rock & Memphis R.W. Co. v. East Tennessee, Virginia & Georgia R.W. Co. .....3 I.C.C. Rep. 1 291
London & Birmingham R.W. Co. v. Winter . . . . .Cr. & Ph. 57 258
London Interswitching Case.....6 Can. Ry. Cas. 327..... 303
Louisville & Nashville R.W. Co. v. Sickings . . . . .5 Bush 1 225
Luckraft v. Pridam .....6 Ch. D. 205 270

Macdonald v. Longbottom .....28 L.J.Q.B. 293 6
Madden v. Nelson & Fort Sheppard R.W. Co. ..... (1899) A.C. 626 .....177, 284
Marshall v. Industrial Exhibition Association of Toronto .....1 O.L.R. 319 67
Mason v. South Norfolk R.W. Co....19 O.R. 132 260
Martin v. Louisville & Nashville R. W. Co. .....9 I.C.C. Rep. 581 128
May v. Ontario and Quebec R.W. Co..10 O.R. 70 169
McArthur v. Dominion Cartridge Co. (1905) A.C. 72 .....234, 411
McArthur v. Northern & Pacific Junction R.W. Co. .....15 O.R. 733, 17 A.R. 86 156
McCallum v. Grand Trunk R.W. Co..30 U.C.R. 122, 31 U.C.R. 527.. ..... 165, 174
McGreevy v. The Queen.....13 App. Cas. 770 338
McManus v. Cooke .....35 Ch.D. 681 6
McMichael v. Grand Trunk R.W. Co.12 O.R. 547 10
McMillan v. Manitoba & North Western R.W. Co. .....4 Man. L.R. 220 30
McMullen v. Macdonell .....27 U.C.R. 36 160
McSloy v. Smith .....26 O.R. 508 356
Menasha Woodenware Co. v. Atchison, Topeka & Santa Fe R.W. Co.....11 I.C.C. Rep. 666 139
Mersey Docks & Harbour Board v. Lucas . . . . .51 L.J.Q.B. 114 270
Metropolitan R.W. Co. v. Jackson...3 App. Cas. 193 411
Metropolitan R.W. Co. v. Wright....11 App. Cas. 156 356
Miller v. St. Louis R.W. Co.....5 Mo. App. 471 226
Montreal, City of, v. Hogan .....31 S.C.R. 1 151

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Montreal Light, Heat and Power Co. v. Roberts . . . . . (1906) A.C. 196 338
Montreal Street R.W. Co. v. Montreal Terminal R.W. Co. . . . . 35 S.C.R. 478, 36 S.C.R. 369, 4 Can. Ry. Cas. 369, 373 . . . . 118, 279
Moore v. City of Toronto . . . . . 26 O.R. 59n 66
Moore v. Woodstock Woollen Mills Co. . . . . 29 S.C.R. 627 436
Morgan v. Griffith . . . . . L.R. 6 Ex. 70 6
Morgan v. Metropolitan R.W. Co. . . . L.R. 3 C.P. 553, L.R. 4 C.P. 97. 263
Morgan v. Milman . . . . . 3 DeG. M. & G. 35 259
Morrow v. Canadian Pacific R.W. Co. 21 A.R. 149 411
Muskoka Mill & Lumber Co. v. McDermott . . . . . 21 A.R. 129 160

New Orleans Cotton Export v. Illinois Central R.W. Co. . . . . 3 I.C.C. Rep. 534 138
Newry, Town Commissioners of, v. Great Northern R.W. Co. . . . . 7 Ry. & C. Tr. Cas. 184 127
New York Produce Exchange v. Baltimore, Ohio R.W. Co. . . . . 7 I.C.C. Rep. 612 129
North Shore R.W. Co. v. Pion . . . . . 14 App. Cas. 612 160
North Shore R.W. Co. v. McWillie . . 17 S.C.R. 511 . . . . . 159, 165
Northern Pacific Express Co. v. Martin . . . . . 26 S.C.R. 135 378

O'Hearn v. Town of Port Arthur . . . . 4 O.L.R. 209, 2 Can. Ry. Cas. 173 356
Ontario Lands & Oil Co. v. Canada Southern R.W. Co. . . . . 1 O.L.R. 215, 1 Can. Ry. Cas. 17. 54
Ontario & Quebec R.W. Co. v. Philbrick . . . . . 12 S.C.R. 288 344
Ottawa Electric R.W. Co. v. City of Ottawa and Canada Atlantic R.W. Co. . . . . 37 S.C.R. 354, 5 Can. Ry. Cas. 126, 131 285

Palmer v. Grand Junction R.W. Co. . . 4 M. & W. 749 169
Palmer v. Michigan Central R.W. Co. 6 O.L.R. 90, 7 O.L.R. 87, 2 Can. Ry. Cas. 239, 3 Can. Ry. Cas. 194 54
Panton and Cramp Steel Co., In re . . 9 O.L.R. 3 374
Parkdale, Corporation of, v. West . . . . 12 App. Cas. 602 159
Parry v. Croydon Commercial Gas & Coke Co. . . . . 15 C.B.N.S. 568 270
Pembroke, Township of, v. Canada Central R.W. Co. . . . . 3 O.R. 503 111
Phair v. Canadian Northern R.W. Co. 5 Can. Ry. Cas. 334 . . . . . 17, 347
Phillips Co. v. Grand Trunk Western R.W. Co. . . . . 11 I.C.C. Rep. 659 138
Phillips v. Martin . . . . . 15 App. Cas. 193 395
Pittsburg & Connellsville R.W. Co. v. Andrews . . . . . 39 Md. 329 227
Pittsburg & Connellsville R.W. Co. v. McClurg . . . . . 56 Penn. 294 233
Plester v. Grand Trunk R.W. Co. . . . . 32 O.R. 55, 1 Can. Ry. Cas. 27 . . 360
Prendergast v. Grand Trunk R.W. Co. 25 U.C.R. 193 168

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Providence, Washington Insurance Co. v. Gerow . . . . . 14 S.C.R. 731 151

Queen, The, v. Lambourn Valley R.W. Co. . . . . 22 Q.B.D. 463 373
Queen, The, v. London & North Western R.W. Co. . . . . (1894) 2 Q.B. 512 373
Queen, The, v. MacFarlane . . . . . 7 S.C.R. 216 160
Queen, The, v. McLeod . . . . . 8 S.C.R. 1 160

Railroad Company v. Houston . . . . . 95 U.S.R. 697 . . . . . 394, 411
Randall v. Ahearn & Soper . . . . . 34 S.C.R. 698 12
Randall v. Ottawa Electric Co. . . . . 6 O.L.R. 619 12
Rathwell v. Canadian Pacific R.W. Co. . . . . 9 C.L.T. Occ. N. 413 63
Regina v. Bridge . . . . . 24 Q.B.D. 609 270
Regina v. Fick . . . . . 16 U.C.C.P. 379 231
Regina v. Guthrie . . . . . 41 U.C.R. 148 57
Reid and Canada Atlantic R.W. Co., Re . . . . . 4 Can. Ry. Cas. 272 . . . . . 89, 196
Reist v. Grand Trunk R.W. Co. . . . . 6 U.C.C.P. 421 54
Renwick v. Galt, Preston & Hespeler R.W. Co. . . . . 11 O.L.R. 158, 12 O.L.R. 35, 5 Can. Ry. Cas. 108, 376 465
Rex v. City of London . . . . . (1907) 2 K.B. 764 374
Reynolds v. Tilling . . . . . 19 T.L.R. 539 422
Richelieu & Ontario Navigation Co. v. Commercial Union Assurance Co. Q.R. 3 Q.B. 410 339
Richmond & Danville R.W. Co. v. Scott . . . . . 88 Va. 958 233
Roberts v. Great Western R.W. Co. . . . 13 U.C.R. 615 168
Rolland v. Cassidy . . . . . 5 App. Cas. 381 338
Royle v. Canadian Northern R.W. Co. 14 Man. L.R. 275, 3 Can. Ry. Cas. 4 435
Ruttan & Dreifus and Canadian Northern R.W. Co., Re . . . . . 12 O.L.R. 187; 5 Can. Ry. Cas. 339 259
Ryckman v. Hamilton, Grimsby & Beamsville R.W. Co. . . . . 10 O.L.R. 419, 4 Can. Ry. Cas. 457. . . . . 159, 165

Sandon v. White . . . . . 35 S.C.R. 309 260
Saunby v. London Water Commissioners . . . . . (1906) A.C. 110 258
Savannah v. Louisville & Nashville R.W. Co. . . . . 8 I.C.C. Rep. 377 129
Sayers v. British Columbia Electric R.W. Co. . . . . 12 B.C.R. 102 169
Schellenberg v. Canadian Pacific R.W. Co. . . . . 16 Man. L.R. 154, 6 Can. Ry. Cas. 29 . . . . . 19, 347
Scougall v. Stapleton . . . . . 21 O.R. 206 232
Seigel v. Eisen . . . . . 41 Cal. 109 226
Seward v. Vera Cruz . . . . . 10 App. Cas. 59 167
Shibley and Napanee, Tamworth & Quebec R.W. Co., Re . . . . . 13 P.R. 237 257
Shumacher Milling Co. v. Chicago, Rock Island & Pacific R.W. Co. . . 6 I.C.C. Rep. 61 138

Digitized by Google

Sias v. Rochester R.W. Co. .....18 App. Div. (N.Y.) 506 233
Skelton v. London & North Western R.W. Co. .....L.R. 2 C.P. 631.....68, 394
Smith v. Moody .....(1903) 1 K.B. 56 183
Smith v. Niagara & St. Catharines R.W. Co. .....9 O.L.R. 158, 4 Can. Ry. Cas. 220 432
Smith v. South Eastern R.W. Co.....(1896) 1 Q.B. 178 208
Snell v. Toronto R.W. Co.....27 A.R. 151 234
Spencer v. Milwaukee & Prairie du Chien R.W. Co. .....17 Wis. 488 227
Stapley v. London, Brighton & South Coast R.W. Co. .....L.R. 1 Ex. 21 68
Stewart v. Kennedy .....15 App. Cas. 108 91
Stilliway v. Corporation of City of Toronto . . . .20 O.R. 98 35
St. Lawrence & Ottawa R.W. Co. v. Lett . . . .16 S.C.R. 422 209
Stone v. Rossland Ice and Fuel Co...12 B.C.R. 66 38
Stuart v. Jones .....1 E. & B. 22 270
Stubley v. London & North Western R.W. Co. .....L.R. 1 Ex. 12 394
Studer v. Buffalo & Lake Huron R.W. Co. . . . .25 U.C.R. 160 .....10, 54
Summers v. Circuit City R.W. Co....34 La. Ann. 139 226

Tennant v. Union Bank of Canada..(1894) A.C. 31 .....284, 473
Texas & Pacific R.W. Co. v. Interstate Commerce Commission .....162 U.S.R. 197 140
Thomson v. Advocate General .....12 Cl. & F. 1 190
Thomson and Victoria R.W. Co., Re.8 P.R. 423 374
Tipton, Mayor & Council of, v. Louisville & Nashville R.W. Co.....9 I.C.C. Rep. 160 128
Todd v. Old Colony & Fall River R.W. Co. . . . .3 Allen 18, 80, Am. Dec. 49.... 224
Toronto, City of, v. Grand Trunk R. W. Co. .....37 S.C.R. 232, 5 Can. Ry. Cas. 138 .....274, 283
Toronto Public Library Board v. City of Toronto .....19 P.R. 329 371
Troy, Board of Trade of, v. Alabama Midland R.W. Co. .....6 I.C.C. Rep. 1 128

Vera Cruz (No. 1) .....9 P.D. 88 158
Vezina v. The Queen .....17 S.C.R. 1 54

Wabash R.W. Co. v. Misener .....12 O.L.R. 71, 38 S.C.R. 94, 5 Can. Ry. Cas. 356, 6 Can. Ry. Cas. 70 .....396, 438
Wakelin v. London & South Western R.W. Co. .....12 App. Cas. 41 422
Wallman v. Canadian Pacific R.W. Co. . . . .16 Man. L.R. 82, 6 Can. Ry. Cas. 229. 495
Walters v. Canadian Pacific R.W. Co. . . . .1 Terr. L.R. 88 170
Watson v. Grant .....9 O.W.R. 53 15

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Webb v. Barton Stoney Creek Road Co. . . . .26 O.R. 343 170
Weil v. Pennsylvania R.W. Co.....11 I.C.C. Rep. 627 138
Weir v. Canadian Pacific R.W. Co...16 A.R. 100 3
Wells v. Northern R.W. Co. .....14 O.R. 594 55
Westbourne Cattle Co. v. Manitoba & North Western R.W. Co.....9 Man. L.R. 501 63
Wicher v. Canadian Pacific R.W. Co..16 Man. L.R. 343, 6 Can. Ry. Cas. 181 260
Wichita, Mayor & Council of, v. Chicago, Rock Island & Pacific R. W. Co. .....9 I.C.C. Rep. 569 128
Wilding v. Sanderson .....(1897) 2 Ch. 534 91
Williams v. Adams .....2 B. & S. 312 284
Wilmington Tariff Association v. Cincinnati, Portsmouth & Virginia R.W. Co. . . . .9 I.C.C. Rep. 118 128
Wilson v. West Hartlepool Harbour & R.W. Co. .....34 Beav. 187 258
Winchester v. Great Western R.W. Co. . . . .18 U.C.C.P. 250 3
Wood v. Canadian Pacific R.W. Co..30 S.C.R. 110 197
Wood's Estate, In re .....31 Ch.D. 607 170

York v. Canada Atlantic Steamship Co. . . . .22 S.C.R. 167 432

Zimmer v. Grand Trunk R.W. Co...21 O.R. 628, 19 A.R. 693...159, 167

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CANADIAN RAILWAY CASES.

RAILWAY CROSSINGS—SIGNALS—CONTRIBUTORY NEGLIGENCE.

MANITOBA.] [DUBUC, C.J.

PEDLAR v. CANADIAN PACIFIC R.W. CO.

(6 *West. L.R.* 201.)

Railway—Destruction of horses by engine at crossing—Negligence—Contributory negligence—Railway Act, 1903, *sec.* 224—*Conflicting evidence as to blowing whistle—Failure to ring bell—Neglect of persons in charge of horses to look out for train—Occurrence within city limits—Exception in statute—Failure of evidence to negative.*

An accident having occurred upon a highway crossing in the city of Winnipeg and there having been some evidence of neglect on the defendants' part the plaintiff would have been entitled to recover but for his failure to shew under sec. 224 of the Railway Act, 1903, that there was no by-law of the city of Winnipeg prohibiting the defendants from sounding the whistle and ringing the bell, the onus being upon the plaintiff to prove the existence of such by-law.

ACTION to recover the value of a team of horses and for damage done to a wagon and harness.

C. P. Fullerton, for plaintiff.

O. H. Clark, K.C., for defendants.

June 12th, 1907. DUBUC, C.J.:—The plaintiff's team of horses, while proceeding along Cambridge Street, within the limits of the City of Winnipeg, and crossing the railway track of the defendants, was struck by one of the defendants' passing engines. The two horses were killed and the wagon and harness injured.

The question is whether the accident was caused by the negligence of the defendants, and whether the plaintiff's man driving the horses was guilty of such contributory negligence as to disentitle the plaintiff to recover.

By section 224 of the Railway Act of 1903 it is enacted that, "when any train is approaching a highway crossing at rail level (except within the limits of cities or towns where the muni-

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cipal authority may pass by-laws prohibiting the same), the engine whistle shall be sounded at least 80 rods before reaching such crossing, and then the bell shall be rung continuously until the engine has crossed such highway."

It is provided further that the railway company shall be liable for all damage sustained by any person by reason of such neglect.

As to the blowing of the whistle on the occasion in question, the evidence is conflicting.

Richard Hughes, who was driving the team which was killed, and G. H. Pedlar, who was there at the time of the accident, swear that they did not hear the whistle, and that, if it had been sounded, they would have heard it.

Charles B. Lilley, the driver in charge of the locomotive, and Harry McFee, the fireman, state that the whistle was blown.

Whether the whistle was blown and not heard by Pedlar and Hughes, or whether two of the four witnesses are not telling the truth, I am not prepared to find. The negligence or non-negligence of the defendants may be determined without deciding that point.

It was the duty of the defendants to ring the bell, and it was not shewn or suggested that the bell was rung. So, on that point, under the provision of the statute above referred to, the defendants must be held guilty of negligence.

It is contended on behalf of the defendants that it has not been shewn that the crossing in question was on a highway, but I think this is sufficiently established by the evidence of Bemister, Dominion and Provincial land surveyor.

The defence raised the question of contributory negligence on the part of the plaintiff's men, in not looking out on each side of the crossing to see whether a train was coming. The evidence on that point is contradictory. The plaintiff's men say that they looked out; that there was some obstruction which prevented them from seeing the engine coming; and that they did not hear the rumble of the locomotive.

On the other hand, it is shewn by the defendants' witnesses

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that 50 feet on the north side of the crossing whence the plaintiff's men were coming, the headlight of the engine could have been seen between 500 or 600 feet from the crossing.

If the plaintiff's men had looked out and stopped at that distance from the crossing, the accident would not have taken place.

If it was so—and I incline to believe that it was—it should be held under *Winchester* v. *Great Western R.W. Co.*, 18 U.C.C.P. 250; *Johnston* v. *Northern R.W. Co.*, 34 U.C.R. 432; *Weir* v. *Canadian Pacific R.W. Co.*, 16 A.R. 100, and other cases in the same line, that the pliantiff's men were guilty of contributory negligence, and that, under such circumstances, although there may have been negligence on the part of the defendants, the plaintiff would not be entitled to recover.

But there is another point of some importance in this case. As to failure to ring the bell of the engine in approaching a highway crossing, there is, in section 224 of the Railway Act, an exception which has to be considered. The section says that the whistle should be sounded and the bell should be rung, "except within the limits of cities or towns where the municipal authority may pass by-laws prohibiting the same."

The point was raised on the argument that there is nothing in the evidence to negative that exception, and to shew that there is no by-law of the City of Winnipeg prohibiting the same.

The plaintiff has not alleged in his statement of claim, nor proven, that there is no such by-law in existence.

If there were such a by-law the defendants would not be bound to blow the whistle or ring the bell, and there would be no negligence on their part in not doing so.

If the plaintiff had negatived the exception even only in the evidence, the statement of claim might have been amended to allow him to succeed. But, having failed to do so, I think he cannot recover.

I am, therefore, of opinion that the action should be dismissed with costs.

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FENCES—CATTLE—OWNER'S NEGLIGENCE.

ONTARIO.] [DIVISIONAL COURT.

YEATES v. GRAND TRUNK R.W. CO.

(14 *O.L.R.* 63.)

Railways—Accident—Injury to Cattle—Crossing—Negligence—Special Agreement—Liability—Tenant—Railway Act, 1903—3 *Edw. VII. ch.* 58, *sec.* 237, *sub-sec.* 4 (*D.*).

Sec. 237, sub-sec. 4, of the Canada Railway Act, 1903, 3 Edw. VII. ch. 58, (D.) enacts that: "When any cattle or other animals at large upon the highway or otherwise, get upon the property of the company and are killed or injured by a train, the owner of such animals so killed or injured shall be entitled to recover the amount of such loss or injury against the company . . . unless the company . . . establishes that such animals got at large through the negligence . . of the owner or his agent . . ":—

Held, that, on the proper construction, the reference in the above section is not to animals getting upon the railway from an adjoining enclosure, but only to animals at large upon the highway or otherwise at large; and that it can have no reference to animals escaped from an adjoining field where, apart from any defect in railway fencing, they were properly enclosed.

The action was brought for the loss of cattle of the plaintiff which escaped from his enclosure and got upon the railway and were killed. The plaintiff was a lessee from the owner for one year, and his animals got on the railway owing to a defective gate at the farm crossing. Prior to the plaintiff's lease the owner had agreed with the defendants that he might put in the crossing provided he did it himself and would keep his gates up, and that the defendants should not be responsible for anything he might lose on that crossing:—

Held, that this agreement exonerated the defendants, the plaintiff being bound by it whether he knew it or not when he took his lease.

Held, also, *per* Riddell, J., that the plaintiff's contributory negligence disentitled him to recover. It was proved by evidence properly admitted that the plaintiff had agreed with the owner to keep up the gates, and while this could not be relied upon by the defendants as an estoppel, or, in itself a perfect defence by way of contract, it was cogent evidence of contributory negligence, for the plaintiff knew it was his duty to keep the gate in repair and he knew that the gate was not a safe gate, yet he deliberately put his animals into the field.

THIS was an appeal by the plaintiff from the judgment of His Honour the Judge of the county court of the county of Lambton, dismissing this action with costs, under the circumstances stated in the judgments of this Court. The action was brought for the loss of one horse and three cows belonging to the plaintiff, which had escaped from the plaintiff's enclosure and got upon the defen-

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dants' railway and been killed. The appeal was argued on February 20th, 1907, before FALCONBRIDGE, C.J.K.B., and BRITTON and RIDDELL, JJ.

A. Weir, for the plaintiff, contended that the only question was whether the plaintiff had by any act of his debarred himself from recovery; that as to the Railway Act, 1903, 3 Edw. VII. ch. 58, sec. 237 (4),* the clause as to negligence only applies to the case of cattle at large on the railway: *Dunsford* v. *Michigan Central R.W. Co.* (1893), 20 A.R. 577. He also cited *Bacon* v. *Grand Trunk R.W. Co.* (1906), 12 O.L.R. 196.

W. E. Foster, for the Grand Trunk R.W. Co., contended that Yeates could occupy no higher position than Jamieson, who had agreed to keep up the crossing; and that the plaintiff knew of the defects when he put the cattle in: *Grand Trunk R.W. Co.* v. *Perrault* (1905), 36 S.C.R. 671.

J. Cowan, K.C., for Jamieson, contended that the plaintiff as tenant could only take the position of Jamieson: *Great Western R.W. Co.* v. *Vilaire* (1862), 11 U.C.C.P. 509; *Clayton* v. *Great Western*

* 3 Edw. VII. ch. 58, sec. 237 (D.): No horses, sheep, swine or other cattle shall be permitted to be at large upon any highway, within half a mile of the intersection of such highway with any railway at rail level, unless such cattle are in charge of some competent person or persons, to prevent their loitering or stopping on such highway at such intersection, or straying upon the railway.

2. All cattle found at large contrary to the provisions of this section may . . . be impounded . . .

3. If the cattle of any person, which are at large contrary to the provisions of this section, are killed or injured by any train at such point of intersection, he shall not have any right of action against any company in respect of the same being so killed or injured.

4. When any cattle or other animals at large upon the highway or otherwise, get upon the property of the company and are killed or injured by a train, the owner of such animal so killed or injured shall be entitled to recover the amount of such loss or injury against the company in any action in any court of competent jurisdiction, unless the company, in the opinion of the court or jury trying the case, establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent; but the fact that such animal was not in charge of some competent person or persons shall not, for the purpose of this sub-section, deprive the owner of his right to recover.

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R.W. Co. (1873), 23 U.C.C.P. 137; *Kilmer* v. *Great Western R.W. Co.* (1874), 35 U.C.R. 595; *Corry* v. *Great Western R.W. Co.* (1881), 7 Q.B.D. 322, at p. 327; that sub-sec. 4 of sec. 237 of the Railway Act, 1903, does not apply to adjoining owners; that the object is to put people who have stray cattle in the same position as adjoining owners; that here the cattle were not at large and the sub-section does not apply. He also cited, on the question of the admissibility of evidence of the agreement between Jamieson and the defendants: Taylor on Evidence (Black. ed.), at pp. 1015-7; *Macdonald* v. *Longbottom* (1859), 28 L.J.Q.B. 293; *Bulmer* v. *Brumwell* (1886), 13 A.R. 411; *Morgan* v. *Griffith* (1871), L.R. 6 Ex. 70; *Erskine* v. *Adeane* (1871), L.R. 8 Ch. 756; *McManus* v. *Cooke* (1887), 35 Ch.D. 681; *Handy* v. *Carruthers* (1894), 25 O.R. 279.

Weir, in reply, referred to *Houston* v. *McLaren* (1887), 14 A.R. 103, at pp. 108, 109.

March 11, 1907. BRITTON, J.:—The action was brought for the loss of one horse and three cows, which escaped from plaintiff's enclosure and got upon defendants' railway and were killed.

The third party, Angus Jamieson, is the owner of all of lot 24 in the front or 9th concession of the township of Sarnia, except that part taken by defendants for their right of way.

On April 7th, 1906, Jamieson made a lease of this land to the plaintiff for one year—from April 1st, 1906. On September 6th, 1906, the animals mentioned got from the land, where they were lawfully pasturing, upon the railway, and they did so because of a defective and insufficient gate or an insufficiently fastened gate, at the farm crossing.

The plaintiff asserts and seeks to establish liability on the part of the defendants on two grounds:—

(1) Under the Railway Act, 1903, 3 Edw. VII. ch. 58, sec. 237, sub-sec. 4 (D.), and,

(2) Under sec. 199 of that Act.

As to the first, in my opinion, sec. 237, sub-sec. 4, does not apply to the case of animals getting upon the railway from an adjoining

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field or enclosure, but applies only to animals at large upon the highway or otherwise at large. It can have no reference to animals escaping from an adjoining field where, apart from any defect in the railway fence, they were properly enclosed. If the broad meaning contended for by the plaintiff could be given to this section, the defendants would be liable for the loss of animals in cases in which no breach of duty on the part of the defendants could be shewn. Sub-section 4 is very badly worded, and perhaps not easy of clear interpretation, but it was intended to have the meaning put upon it as it appears in the R.S.C. 1906, ch. 37, sec. 294, sub-sec. 4, and sec. 295.*

None of the cases cited by the plaintiff upon this point as to construction of sec. 237, or liability under it, assist the plaintiff to the smallest extent.

As to the second, there is more to be said. There is no doubt primarily the liability to fence, and the law requires "fences of a minimum height of 4 feet 6 inches on each side of the railway; (b) swing gates in such fences, of the minimum height aforesaid, with proper hinges and fastenings at farm crossings, provided that sliding or hurdle gates already constructed may be maintained."

The defence upon this branch of the case is put upon two grounds:

*R.S.C. 1906, ch. 37, sec. 294, sub-sec. 4:—Where any horses, sheep, swine or other cattle at large, whether upon the highway or not, get upon the property of the company and are killed or injured by a train, the owner of any such animal so killed or injured shall, except in the cases otherwise provided for by the next following section, be entitled to recover . . . unless the company establishes that such animal got at large through the negligence or wilful act or omission of the owner, or his agent, or of the custodian of such animal or his agent.

Sec. 295.—No person whose horses, cattle, or other animals are killed or injured by any train shall have any right of action against any company in respect of such horses, cattle, or other animals being so killed or injured, if the same were so killed or injured by reason of any person—

(a) for whose use any farm crossing is furnished failing to keep the gates at each side of the railway closed, when not in use; or,

(b) . . .

(c) . . .

(d) . . .

(e) . . .

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(1) An express agreement between the third party and the defendants that this crossing was for the owner's convenience and that he should assume all responsibility for it and that the defendants should not be under any liability in reference to it: (a) it is said this agreement was known to the plaintiff, and the plaintiff accepted the lease subject to it, he agreeing with the owner in reference to it as the owner had agreed with the defendants: (b) it is argued that, without any such knowledge on the part of the plaintiff, and without any agreement between him and his landlord, he stands as between him and the defendants in no better position than the landlord.

And (2) contributory negligence on the part of the plaintiff.

The trial Judge found that such an agreement was made by the third party with the defendants.

There is not, as I read the reasons for judgment, any express finding that the plaintiff knew of this agreement with the defendants, and there is no finding of any undertaking or agreement on the plaintiff's part to look after the crossing or railway fences or gates thereat.

There is evidence that when the plaintiff called upon the third party before the lease was executed and when the proposed lease was discussed, Mrs. Jamieson (wife of the third party) notified the plaintiff that the crossing was theirs, and that the plaintiff must be responsible for it. It may be that the Judge intended to find this to be true, although the plaintiff contradicts it. The Judge does not say what his finding is.

What was the agreement between Jamieson and the defendants? Jamieson's account of it is, that he wanted this crossing as a second crossing; that some person, presumably Mr. Hannaford, assuming to represent the defendants, came to Jamieson's and told him that he, Jamieson, could put in the crossing provided he did it himself, and would take it up afterwards, and would keep his gates up, and that the defendants would not be responsible for anything he would lose on that crossing; and Jamieson did build the crossing, and did construct the gates, and he kept the gates and crossing in repair down to the time of leasing to the plaintiff. The learned Judge finds, and upon evidence quite sufficient to warrant the finding,

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that such an agreement was made. Such an agreement was under the authorities sufficient to exonerate the defendants, as between them and Jamieson, for liability for accidents occurring by reason of the gates at that crossing.

In *Great Western R.W. Co.* v. *Vilaire*, 11 U.C.C.P. 509, the defendants had at the request of the plaintiff constructed gates and fastenings for the accommodation of the plaintiff, in place of a continuous fence. The Court held that by accepting the gates the plaintiff must be held to have acquiesced in the fence being so constructed. I assume that the animals got upon the railway not by reason of the gate being left open, but solely by reason of the gate and its fastenings being defective and insufficient. The owner of the land, for his own convenience and benefit, constructed the gate and accepted it, and that by him was a waiver of the statutory duty to fence, and as to damage resulting from what he did, an exoneration of the defendants from liability.

Then, is the plaintiff, assuming that he did not know of the agreement of his landlord, bound by it? I put it this way because the knowledge of the plaintiff is a question of fact upon which the Judge has not expressly found, and if material the plaintiff's only remedy would be a new trial.

I think the plaintiff is bound by the agreement whether he knew of it or not, and I agree with the learned Judge that the case cited of *Corry* v. *Great Western R.W. Co.*, 7 Q.B.D. 322, is authority for it. In that case the settlement by the landlord with the railway company was after the lease was made and during its currency. The plaintiff was an occupier when settlement made, and was held entitled to recover for the loss of his cow.

Bramwell, L.J., at p. 325, said: "His landlord cannot be taken to have given up any right which the plaintiff had as his tenant, and I think it would be a hardship upon the plaintiff if it were otherwise, because the plaintiff was no party to the agreement by which the landlord gave up the right to fencing, and the landlord did not choose to give him notice to quit," etc.

Baggallay, L.J., at p. 327: "No doubt it would have been in the power of the railway company to have required such tenancy

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to be put an end to. If that had been done I should have agreed . . . . that a person who acquired a fresh tenancy after the owner had given up his right to the accommodation works, could not enforce such a demand as is made by the plaintiff in the present action."

Then this case is within *Kilmer* v. *Great Western R.W. Co.*, 35 U.C.R. 595, cited by the learned Judge. Although not the same point in that case, the same principle is involved. It was there held, that as the fence was originally removed with the assent of the parties interested in it, the defendants could not be liable without a notice to erect it from some one duly authorized.

Here unquestionably the defective gate and fastenings for this crossing and the crossing itself were placed with the assent of all parties then interested. The plaintiff knew of the defects and danger. He did not call upon his landlord, or the defendants, to put a proper gate and fastenings.

For these reasons I think the appeal fails.

As to contributory negligence, I agree with the trial Judge in his conclusion that, were it not for the agreement which the third party made with the defendants, the defendants would be liable in this action. The plaintiff would not be disentitled to recover by reason of his continued use of the faulty gate and its fastenings. If, as between him and the defendants, it was the duty of defendants to provide and maintain a proper gate and fastenings, as prescribed by statute, such knowledge as the plaintiff had, and such use as the plaintiff made of the gate and fastenings as they were, would not warrant the conclusion that the plaintiff has adopted them as sufficient. See *McMichael* v. *Grand Trunk Railway Company* (1886), 12 O.R. 547; *Dunsford* v. *Michigan Central R.W. Co.*, 20 A.R. 577; *Studer* v. *Buffalo and Lake Huron R.W. Co.* (1866), 25 U.C.R. 160.

Appeal dismissed with costs.

FALCONBRIDGE, C.J.:—I agree that the appeal should be dismissed with costs.

RIDDELL, J.:—Angus Jamieson, being the owner of lot 24 in the

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9th concession of the township of Sarnia, through which the line of the defendants ran, was provided with a crossing by the defendants. He was desirous of having another crossing, and entered into an arrangement with a servant of the defendants that he might put in another crossing at his own expense upon condition that he should keep up the gates, and relieve the defendants of any liability for any stock lost on that crossing. This arrangement was carried out and the crossing made, and Jamieson thereafter continued to look after the gates. On one occasion two cows of his escaped at this crossing and were killed; but no claim was made upon the defendants, as he knew he "couldn't get anything."

On April 7th, 1906, he leased the land to the plaintiff. During the negotiations for the lease Jamieson and others swear that the plaintiff received full notice of the agreement with the defendants, and agreed to keep the gate at the crossing in proper repair. The plaintiff denies this, but the learned county court Judge finds it as a fact, and I agree with him. It is also found upon satisfactory evidence that the gates were at the time of the demise in good condition.

The plaintiff did not keep the gates in repair. On September 6th, 1906, at which time as admitted by his counsel he knew the gates were not safe, he placed certain horses and cattle in a field adjoining the line of the railway where was a defective gate; these animals got through the defective gate and were killed. He sued the defendants in the county court of the county of Lambton for damages. Jamieson was brought in as a third party and the action tried at Sarnia by the learned county court Judge of that county. By him the action was dismissed.

An appeal was taken before us and argued with great ability by counsel for all parties.

Mr. Weir contended for the plaintiff:

(1) That evidence should not have been allowed of the alleged contract between the defendants and third party, such evidence being forbidden by the Statute of Frauds.

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(2) That evidence should not have been allowed of the agreement by the plaintiff with the third party to keep up the gates.

(3) That even if such an agreement were made, the defendants should not be allowed to take advantage of it by way of estoppel or contract, as there is no privity of contract between them and the plaintiff.

(4) This contract between the defendants and Jamieson was put an end to by the acts of the defendants in changing a gate.

(5) And in any case, sec. 237 (4) of the Railway Act, 1903, concludes the case in favour of his client.

As to the first point, I think *Great Western R.W. Co.* v. *Vilaire*, 11 U.C.C.P. 509, furnishes a complete answer to the objection.

The second objection is also untenable. It is of course clear law that a written document such as the lease given here by the third party to the plaintiff cannot be varied by parol. A very strong case is *Henderson* v. *Arthur*, [1907] 1 K.B. 10. But this is not a matter of varying or in any way affecting the terms of the lease. The gate which the plaintiff offered to keep in repair is not upon the demised land but on the land of the defendants. The agreement is collateral to the lease and does not vary or purport to vary any of the provisions therein contained: *Erskine* v. *Adeane* L.R. 8 Ch. 756; *Morgan* v. *Griffith*, L.R. 6 Ex. 70; *Angell* v. *Duke* (1875), L.R. 10 Q.B. 174; *Heseltine* v. *Simmons*, [1892] 2 Q.B. 547; *De Lassalle* v. *Guildford*, [1901] 2 K.B. 215.

The third objection is, I think, well taken. In the case of *Randall* v. *Ottawa Electric Co.* (1903), 6 O.L.R. 619, S.C. *sub nom. Randall* v. *Ahearn & Soper* (1904), 34 S.C.R. 698, Randall was a lineman in the employ of the Ottawa Electric Company, and in his agreement with his employers it had been stipulated that whenever he was at work where there was any possibility of receiving a shock, he should wear rubber gloves. He was on a pole near wires belonging to Ahearn & Soper; he was not wearing rubber gloves, and so he received a severe shock, resulting in a fall and much injury to him. In an action against Ahearn & Soper, while it was admitted that the plaintiff must necessarily fail in an action against his own employers, "the bald fact of the absence of gloves

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on the plaintiff's hands at the time of the accident was not in itself sufficient to withdraw the case from the jury . . . as between plaintiff and defendant between whom there was no contractual relation with respect to gloves": 34 S.C.R., at p. 703.

As to the fourth point, I do not find in the evidence that there was as a fact any termination of the agreement between the defendants and the third party. It is claimed by the plaintiff that a change was made in the gates as put in and kept up by Jamieson; but Jamieson, upon being examined by the trial Judge, shews that he knew all about the change, and there is no pretence that he ever complained of the change. He is not complaining now; but both in his pleadings and at the trial he asserts the continued existence of the agreement.

If the east crossing—*i.e.*, that which the defendants were to keep up—has been closed by them, it may be that that would give Jamieson a right of action; or it may be that he might apply to the Board of Railway Commissioners for Canada under the provisions of sec. 198 (1) (2). This application, however, would require to be made by him, the land owner, and not by the tenant in any case.

There is much authority against the right of the land owner to have a crossing at all in the absence of an express contract, and I do not think it necessary in this case to decide whether any such right exists; but it is quite baseless in law to say that the closing up of the east crossing in any way compelled the defendants to take charge of that to the west, which Jamieson had put in for his own purposes and agreed to take care of.

The fifth point now remains to be dealt with. If it were necessary to interpret sec. 237 (4) of the Railway Act, 1903, there would be much difficulty in the task. Mr. Weir argues that the section should be read as though it meant that if cattle got upon the property of the company from being at large upon the highway then if they were killed or injured the owner might be deprived of any right to compensation if it were proved that they got at large through the negligence of the owner, etc.; but that if they otherwise got upon the property of the company and were killed or in-

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jured, the company could not get rid of its liability by any evidence of negligence or omission. He contends that it should be read as though it said: "When any cattle or other animals at large upon the highway get upon the property of the company, or when any cattle, etc., otherwise get upon the property of the company and in either case they are killed or injured by a train, the owner of any such animal . . . shall be entitled to recover . . . against the company . . . unless the company . . . establishes in the case of the animal so getting on from being at large upon the highway that such animal got at large through the negligence . . . . of the owner, etc.; but that if the animal got on the property of the company otherwise than from being at large upon the highway, the company must pay, no matter how negligent the owner may have been." Whatever the section may mean, it cannot in my judgment mean that, and I think if the company can prove that the animal got upon the property of the company through the negligence, etc., of the owners, etc., a defence is made out. Otherwise an owner of cattle might open the gate to the railway track and let his cattle run out and be killed; and then recover the amount of his loss. Or he might, if someone tore down a fence, calmly turn his cattle into the field and stand and watch them go upon the railway track and then recover from the company. As at present advised, I do not think that sec. 237 (4) applies to the case of adjoining land owners or occupants at all, their case being provided for by sec. 199 (a) (b). If this is so, the older authorities are still good law: *Kilmer* v. *Great Western R.W. Co.*, 35 U.C.R. 595; *Clayton* v. *Great Western R.W. Co.*, 23 U.C.C.P. 137; *Corry* v. *Grea Western R.W. Co.*, 6 Q.B.D. 237, 7 Q.B.D. 322; *Dixon* v. *Great Western R.W. Co.*, [1897] 1 Q.B. 300, at pp. 305-6, *per* Rigby, L.J.

These cases decide that the tenant has no better right than the landlord, and that where such an agreement exists as is proved here the landlord has no claim, and consequently the tenant has no claim.

But if the law is changed by the section referred to, the defendants are entitled to succeed if they shew that the animals got

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upon their lands or to the place at which they were injured through the negligence of the plaintiff.

They can do this, I think, under the provisions of sec. 237 (4). And even if they cannot rely upon the express provisions of that section, they can do so upon common law principles. Whatever Parliament did mean, they certainly, I think, did not mean to take away from the railways the defence of contributory negligence. Upon this, the agreement between the plaintiff and the third party—while it cannot be relied upon by the defendants as an estoppel, or in itself as a perfect defence—is cogent evidence of contributory negligence: 34 S,C.R., at p. 703—"strong evidence of negligence on his part:" S.C., p. 708. So strong evidence that the Court of Appeal in a similar case thought it absolutely conclusive: 6 O.L.R., at p. 630.

The plaintiff knew that it was his duty to keep the gate in repair; he knew the gate was "not a safe gate," "not a proper gate," "not a good gate," "certainly not a proper gate to protect cattle from the dangers of the road." This he knew for months, and indeed he had made up his mind that he would nail it up next morning. Knowing all this, he deliberately put his animals in a field with such a gate. Can it be argued that there is not cogent evidence of contributory negligence here? Upon the undisputed facts, I think contributory negligence has been proved. The learned trial Judge has found that it was by his own negligence that the plaintiff met with his loss, and I agree with him.

There is another ground upon which I think the plaintiff must fail. If he should succeed against the defendants, the defendants are upon the facts proved and found, entitled, to an indemnity from the third party—the third party would be entitled to recover his loss by way of damages from the plaintiff—so that in the result, the plaintiff would have to bear his own loss: *Watson* v. *Grant* (1907), 9 O.W.R. 53.

To my mind the case is as though A. having the right to pass along a public highway belonging to a municipality, but desiring to cross property belonging to the municipality, makes an agree-

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ment with the municipality that he may cross upon the express condition that he will keep the crossing in repair. A., on leasing his land to B., makes a contract with B. that B. shall keep the crossing in repair. B. does not keep the crossing in repair, but on the contrary, uses the crossing from time to time, and is at length himself injured by such non-repair. Could it be successfully contended that B. could recover?

In the present case, the plaintiff had no right to have the defective gate in the fence of the defendants at all except under the express agreement between his landlord and the company, and that was under the express condition of keeping the gates in proper repair. This condition he undertook to fulfil and failed. By reason of this failure he is damnified. It must, I think, be clear that the only cause of the accident was as found by the learned county court Judge—his own neglect.

The appeal should be dismissed with costs.

Since writing the above I have had an opportunity of reading the judgment of my brother BRITTON. I agree with his constructions of sec. 237, sub-sec. 4, of the Railway Act of 1903.

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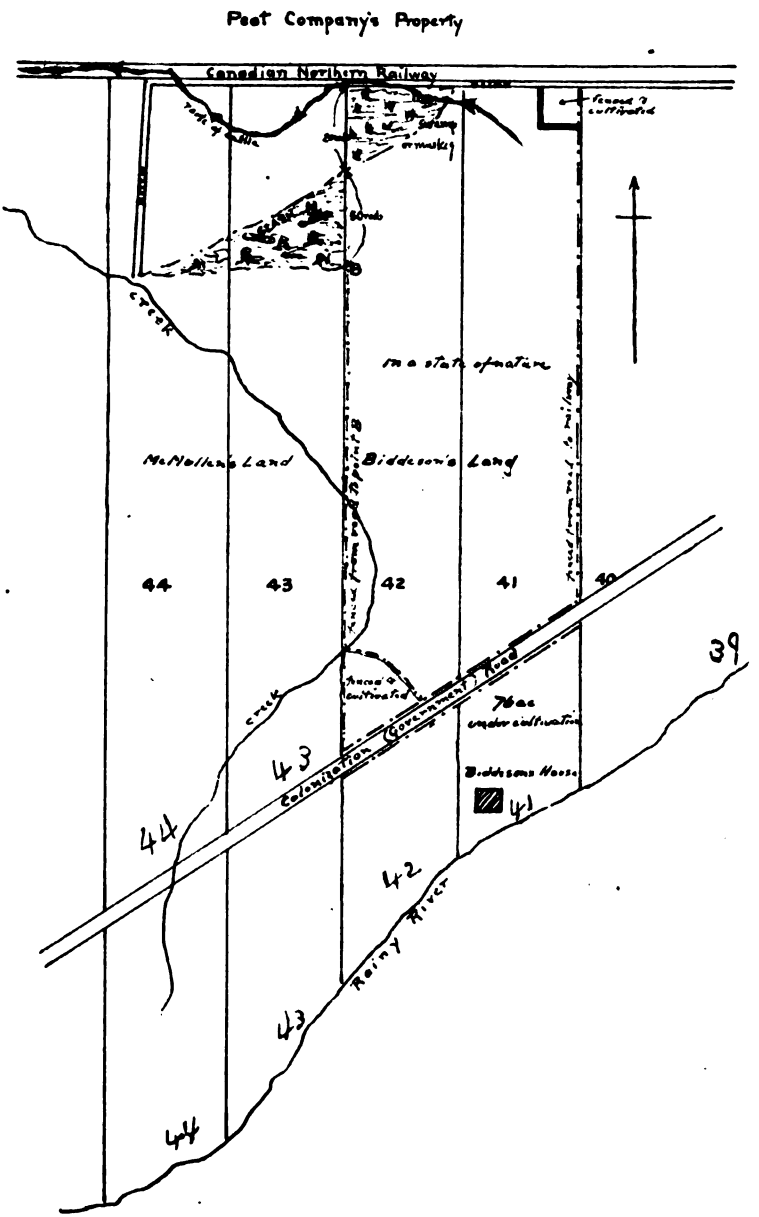
Plan shewing lands described in *Biddeson* v. *C.N.R.*



ERRATA.

Page 17, line 21, headnote, for "south" read "north."
Page 22, line 5, for "eastern" read "southern."

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FENCES—CATTLE—OWNER'S NEGLIGENCE.

In the District Court of the District of Rainy River.

Ontario.] [Chapple, District Judge.

Biddeson v. Canadian Northern R.W. Co.

(*Unreported.*)

Liability to fence—Lands not enclosed—Cattle at large—Secs. 254 *and* 294 *Railway Act, R.S.C. ch.* 37—*Sec.* 199 *Railway Act,* 1903.

The plaintiff's cattle passed from his land (lots 41 and 42) on to the defendants' right of way, and westerly thereon to and across lots 43 and 44, and from off lot 44 again on to the right of way, where they were killed by a passing train.

The railway was not fenced across these lots, nor for many miles on either side of the plaintiff's lands. South of the railway the plaintiff's land was improved and settled, and was enclosed in the following manner:—A colonization road ran south westerly through the plaintiff's land and was fenced on each side; there was a fence on the east side of lot 41 from the colonization road to the right of way, and on the west side of lot 42 there was a fence from the colonization road to a point within 70 rods of the right of way, of which 70 rods about 50 rods was a "slash" of upturned trees, whose roots had been burned and then blown down and left just as they fell; for 20 rods south from the right of way there was no fence or other obstruction but a ditch had been dug by the defendants upon their right of way south of the roadbed extending westward on defendants' land to the north of plaintiff's land and part of McMullen's (the adjoining owner) land, until it turned southward for a distance of more than 20 rods to a creek on lot 44, for the purpose of carrying off the water from defendants' land. The remainder of plaintiff's land south of the colonization road was in a state of nature and used for pasture except a small enclosed portion. There were no fences on McMullen's land other than that referred to on the west side of plaintiff's land. The plaintiff claimed the right, under an agreement, with McMullen to pasture his cattle on lots 43 and 44.

Held (1). That neither the plaintiff's nor McMullen's land was so enclosed as to make the defendants liable to erect a fence between their right of way and these lands as required by section 254 of the Railway Act, R.S.C. ch. 37, and section 199 of the Railway Act, 1903. *Phair* v. *Canadian Northern R.W. Co.*, 5 Can. Ry. Cas. 334, referred to.

(2) That the plaintiff's cattle having the right to be on McMullen's land were not at large within the meaning of sub-section 4 of section 294 of the Railway Act, R.S.C. ch. 37, and the defendants were not liable for their loss, but even if the cattle were considered to be at large, the plaintiff could not recover.

Carruthers v. *Canadian Pacific R.W. Co.*, 6 Can. Ry. Cas. at p. 19, followed.

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This action was tried at Kenora on the 5th day of June, 1907.

G. H. Draper, for plaintiff.
P. E. Mackenzie, for defendants.

June 12, 1907. T. W. CHAPPLE, District Judge:—This is an action brought by the plaintiff to recover from the Canadian Northern Railway Company the sum of $225 damages for the killing of five head of cattle by one of the company's trains.

The plaintiff is the owner of lots 41 and 42 in the Township of McIrvine in the District of Rainy River and the railway line of the defendants passes along the north end of said lots between which said lands and the railway line there is no fence. Adjoining on the west side of the plaintiff's land are lots 43 and 44 owned by Senator McMullen, between whose land and the said railway line there is likewise no fence, nor in fact is there any fence on either side of said railway line in that locality, or for many miles on either side of the plaintiff's land. From the evidence it would appear that the cattle which had been pasturing upon lot 41 of the plaintiff's land on the night of the 5th of July, 1906, passed from said lot on the defendants' right of way, and along said right of way passed by the north end of plaintiff's land which is there a swamp or muskeg on to lots 43 and 44 where there was pasture and from off lot 44 again on to the defendant's right of way across a ditch at the south side of the road bed over which a couple of ties had been placed thus forming a bridge on to the railway track where they were killed by a passing train.

The plaintiff contends that the defendants were bound to have a fence erected between his and Senator McMullen's land and their said railway line, and their failure to do so renders them liable for the loss of said cattle.

The defendants on the other hand said that as the lands of the plaintiff and Senator McMullen were not enclosed, there was no such obligation imposed on them, and that they are not liable for said loss.

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The point raised turns upon the construction of section 254 of the Railway Act, being chapter 37 of the Revised Statutes of Canada, 1906 (formerly section 199 of the Railway Act of 1903). The section deals with the duty of the railway company to erect and maintain fences, gates and cattle guards upon their railway and sub-section 4 reads as follows:—

"Whenever the railway passes through any locality in which the lands on either side of the railway are not inclosed and either settled or improved, the company shall not be required to erect and maintain such fences, gates and cattle guards unless the Board otherwise orders or directs."

It is admitted that no such order or direction has been made by the Board.

In the Railway Act of 1903 the words after "lands" in the second line of said sub-section were "on either side of" the railway *are not improved or settled and inclosed, etc.,* and several actions arose out of a difference in the construction of these words, so that in the Revised Statutes they are *transposed* without altering their meaning, in order to clear up doubts which arose in such cases as *Phair* v. *Canadian Northern R.W. Co.*, 5 Can. Ry. Cas. 334; *Schellenberg* v. *Canadian Pacific R.W. Co.*, 6 Can. Ry. Cas. 29, and others, where opinions differed as to whether it was necessary that lands should be inclosed as well as settled or improved before the railway company become liable to fence. Now the statute makes it quite clear that the lands on either side of the railway *must be inclosed* which is in confirmation of the opinions of the learned Judges who tried these cases.

As regards the plaintiff's land the farm consists of 146 acres upon which he has resided since 1874. 76 acres of the front or southern portion facing upon Rainy River is and has been under cultivation for many years, and on which there is erected a dwelling house and outbuildings, so that there is no question but what the plaintiff's land is both improved and settled; but is it inclosed? What is known as the Colonization road runs south westward across the said lots 41 and 42 and there is a fence on

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either side of said road, there is a fence extending all the way along the east side of lot 41 from said colonization road to the right of way of the defendants, and along west side of lot 42 the fence runs northward as far as point "B" upon the plan produced which is within about 70 rods of the defendants' right of way and for about 50 rods of that 70 rods northward from the point "B" there extends a slash both on the plaintiff's and McMullen's land which slash consists of upturned trees whose roots have been burned by fire and then have blown down and left just as they fell, but for about 20 rods south of the line of railway there is no fence or other obstruction between the plaintiff's land and McMullen's. A ditch has been dug by the defendants upon their right of way to the south of the road bed and extending westward on the defendants' property to the north of the plaintiff's land and part of Senator McMullen's land, then turned southward through lot 44 to a creek for the purpose of carrying off the water from the defendants' property, the land for some distance there being of a swampy or muskeg nature. The land to the north side of the railway is owned by a company on which they manufacture peat at a factory for that purpose. There is no fence on either side of the railway line in that locality or for upwards of five miles west of plaintiff's land. To the north of the colonization road there is no land cleared on the plaintiff's land, excepting a portion at the south end, which is surrounded by a fence, and a small portion near the north east corner the rest of the land being in a state of nature, and used for pasture for cattle, a consideration portion being muskeg. There is no clearance of McMullen's land north of the colonization road, and no fences other than that referred to on the west side of the plaintiff's land.

The plaintiff while admitting that there is no fence on the west side of his land southward from the defendant's right of way for about 70 rods, claims that the slash referred to which extends about 50 rods of that distance is sufficient obstruction to cattle to enclose the said land for that distance, and that he having the privilege of allowing his cattle to run or pasture on

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McMullen's land can claim the ditch on lot 44 placed there by the defendants and extending from the defendants' property more than 20 rods southward through McMullen's land to a creek so as to complete the western enclosure of this property. And, therefore, that the defendants were liable to erect and maintain a fence between their line of railway and the plaintiff's and McMullen's land in accordance with section 254 of the Railway Act.

Now, as I have already stated, there cannot be any doubt whatever, both from the Railway Act itself and from the authorities I have referred to that the land of the plaintiff *must be closed* as well as settled or improved.

Mr. Justice Street in *Phair* v. *Canadian Northern R.W. Co.*, made it very clear that a fence or something in lieu thereof must be built around three sides of the plaintiff's property before the railway company is bound to erect a fence between their land and the plaintiff's land. It is not contended for a moment by the plaintiff that there was any fence or anything in lieu thereof on the west side of his land (*i.e.*) between his land and McMullen's for a distance of twenty rods south from the defendant's right of way, and in my opinion the slash he refers to extending for about fifty rods further south is not sufficient to make said land enclosed within the meaning of the Act. The slash merely consists of trees blown down by the wind, after a fire had run through the woods and covering many acres of land, and while perhaps sufficient to obstruct cattle from wandering over that portion of land, could not be considered in lieu of a fence for the purpose of enclosing land, more especially as the meaning of fences is so clearly defined by the said section 254. But as there is admittedly 20 rods in width of the west side not fenced or anything in lieu of a fence, it cannot alter my finding as to the whole property not being enclosed.

I find upon the evidence that the plaintiff's land was not so enclosed as required by the Railway Act as to make the defendants liable to erect a fence between their right of way and his land.

Then as regards McMullen's land the ditch which was dug

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by the defendants through a portion of his land for the purpose of carrying off water from a ditch on their own property was not even on the western boundary of his land and could not be said to enclose his land in any way, the slash which is claimed by the plaintiff to form as a eastern boundary, being merely fallen trees, scattered over several acres, cannot be reasonably contended to act in lieu of a fence to enclose the property, even if any privilege given by him to the plaintiff by which his cattle were allowed to run upon his (McMullen's) land would permit him (McMullen) to use the fence on the east side of the plaintiff's land in order to claim that his lands were so enclosed as to make the defendants liable to erect a fence between their right of way and his land.

I find that Senator McMullen's land was not so enclosed as to make the defendants liable to erect a fence between their property and his.

Therefore the defendants not being liable under the Railway Act to erect a fence between their property and the plaintiff's and Senator McMullen's property, cannot be held liable for the damages occasioned by the killing of the cattle. These cattle cannot be said to have been at large before they got on the property of the railway company, and therefore to come within section 294 (formerly 237) of the Railway Act. True, they first escaped from the plaintiff's land on to the defendant's property, and from there went on to Senator McMullen's property from which they went again on the railway and were killed, but the plaintiff claims that under agreement made with Senator McMullen they had the right to pasture on his (McMullen's) property, and therefore they had the *right to be there,* and were not at large, but even if they could be considered to be at large the remarks of Chief Justice Howell in the recent case of *Carruthers* v. *Canadian Pacific R.W. Co.*, 6 Can. Ry. Cas., at page 19, shew plaintiff could not recover. He says: "It seems to me it might be well said that if the cattle got out of hand and wandered on the track at a place where the company were not bound to fence by law, there would of course be no liability."

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Some evidence was given as to who placed the ties across the ditch over which the cattle passed, but the mere fact of cattle passing over those ties even although placed there by the company's servants, could not under the circumstances, make them liable in any way.

I therefore dismiss the action as against the defendants, and as the law is now so well settled it must be with costs.

FENCES—CATTLE—OWNER'S NEGLIGENCE.

CANADA.] [SUPREME COURT.

CANADIAN PACIFIC R.W. CO. v. CARRUTHERS.

(39 *S.C.R.* 251.)

Negligence— Railway Act, 1903—3 *Edw. VII. ch.* 58, *sec.* 237—*Animals at large—Construction of statute—Words and terms—"At large upon the highway or otherwise"—Fencing of railway—Trespass from lands not belonging to owner.*

C.'s horses strayed from his enclosed pasture situated beside a highway which ran parallel to the company's railway, entered a neighbour's field adjacent thereto, passed thence upon the track through an opening in the fence which had not been provided with a gate by the company, and were killed by a train. There was no person in charge of the animals, nor was there evidence that they got at large through any negligence or wilful act attributable to C.

Held, affirming the judgment appealed from (16 Man. R. 323), that, under the provision of the fourth sub-section of section 237 of The Railway Act, 1903, the company was liable in damages for the loss sustained notwithstanding that the animals had got upon the track while at large in a place other than a highway intersected by the railway.

APPEAL from the judgment of the Court of Appeal for Manitoba, 16 Man. R. 323, *ante* pp. 13 and 15, affirming the judgment of His Lordship Mr. Justice Richards, at the trial, by which the plaintiff's action was maintained with costs.

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The circumstances of the case are sufficiently stated in the head-note and the questions raised on the appeal are discussed in the judgments now reported.

May 20, 1907.

Blackstock, K.C., for the appellants.
J. Edward O'Connor, for the respondent.

June 24, 1907. THE CHIEF JUSTICE.—This appeal is dismissed with costs. I agree in the opinion of Mr. Justice Maclennan.

DAVIES, J.—I agree that the findings of the trial Judge on the question of the plaintiff's negligence should not be disturbed.

I also agree that the meaning of the rather ambiguous words of the four sub-sections of section 237 of the "Railway Act, 1903," "Animals at large upon the highway or otherwise" must be construed to mean "otherwise at large," that is, at large otherwise than upon the highway and not as suggested by Mr. Blackstock "at large or otherwise upon the highway." This latter suggestion would put a limitation upon the meaning of the section never contemplated by Parliament. Properly construed the section covers the case of the cattle of the plaintiff's killed on the railway track.

Since the revision of the Statutes in 1906 the question has ceased to be of importance as the revisors have changed the language so as to make it express what I think was the real meaning of Parliament. It now reads in the Revised Statutes "At large whether upon the highway or not."

IDINGTON, J.—The questions raised in this appeal turn upon the interpretation of the 4th sub-section of section 237 of the "Railway Act, 1903," which reads as follows:—

4. *When any cattle or other animals at large upon the highway or otherwise, get upon the property of the company and are killed or injured by a train,* the owner of any such animals so killed or injured shall be entitled to recover the

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amount of such loss or injury against the company in any action in any Court of competent jurisdiction, unless the company, in the opinion of the Court or jury trying the case, establishes that such animal got at large through the *negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent;* but the fact that such animal was not in charge of some competent person or persons shall not, for the purposes of this sub-section, deprive the owner of his right to recover.

It is first claimed that the horses which were killed on appellant's railway track had got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent, and, therefore, no action can be maintained.

The case was tried by Mr. Justice Richards without a jury and he has found the facts to be against this contention.

It seems to me if he placed implicit reliance on the evidence of the respondent, he could not well find otherwise.

The question then remains, what is meant by "animals *at large upon the highway or otherwise*" getting upon the property of the company and being killed or injured by a train?

A good deal of ingenuity was shewn during the argument to put upon the words "at large upon the highway or otherwise" some meaning other than the plain, ordinary, grammatical meaning the words bear and thus let the appellants free from liability in cases such as this.

Reasons to support these other meanings were sought for in the past history of the legislation bearing on the duty to fence a railway track, and the interpretation thereof by the Courts.

It was urged that behind all that was the common law, which cast the burthen of the care of cattle upon the owner and had to be considered.

Bearing that in mind it was said we must treat all the statutory law on the subject as an invasion thereof, and, therefore, give such statutes a restricted meaning.

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The principle appealed to is theoretically sound, but how far is it applicable here?

I doubt if having due regard to the nature of the title the railway company has acquired, and reason for its acquisition, a full examination of the question from the point of view urged would avail the companies much.

I will not labour with it, however, for the reason that the language of the statute is so explicit, I do not require to; and for the further reason that the long line of cases so much relied upon and the manifest hardship they wrought, in very many instances, seemed to demand a remedy for cases, such as the one now in hand.

To any one conversant with the history of the struggle that had gone on in the Courts for half a century over the nature of the obligations resting upon a railway company to fence its track, there is nothing surprising to find a radical change in regard thereto, in "The Railway Act of 1903."

Finding that radical change in the language of the legislature relative to the nature and extent of the obligation to fence, I see no reason for restricting or straining the meaning of the words.

The word "otherwise" does not mean the same, but a something different from that preceding it. I cannot find anything more aptly different, from being at large on the highway, than just the case the facts here present.

I do not think it necessary for this case to attempt to determine the limits of the obvious change introduced by this Act, as I have observed, relative to the duties of railway companies to fence.

One would expect to find the duty to fence and the liability to compensate for losses suffered through want of proper fencing, generally speaking, correlative.

It seems as if we had here a duty to fence created, but when we come to consider the right of action, it seems doubtful, to say the least, whether the action rests on that statute or the section 4, quite independently of what precedes it.

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If it remain without amendment, many cases may be found necessary to settle what it does mean.

The appeal should be dismissed with costs.

MACLENNAN, J.—The question in this appeal depends on the true construction of section 237 of the "Railway Act."

The horses which were killed strayed from the plaintiff's field, which lay on the south side of a highway, which, running east and west parallel to the railway, crossed the highway, entered a field adjacent to the railway, passed thence upon the track through an opening, which had never been provided with a gate by the company and were killed.

The field adjacent to the railway was not the property of the plaintiff.

The first question is whether the highway crossed by the animals is such a highway as is referred to in section 237, or at all events in sub-section (4) of that section.

I think it is clear that the highway referred to in the first three sub-sections, is one crossing, or intersecting, the railway, and not one running parallel to it, as did the highway in question.

The first sub-section forbids animals to be at large upon any highway, within half a mile of the intersection of *such highway* with a railway at rail level unless, etc.

Sub-section (2) provides for the impounding of cattle found at large contrary to the provisions of the section, plainly meaning at large upon an *intersecting* highway.

Sub-section (3) deprives the owner of animals killed at the *point of intersection*, of any right of action.

Then follows sub-section (4) which is relied upon by the plaintiff, and it gives an action to the owner of animals at large upon *the highway or otherwise* which get upon the property of the company, and are killed or injured by a train, unless under certain specified conditions.

I think the kind of highway here mentioned is the same as that mentioned in the preceding sub-sections, that is to say,

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an *intersecting* highway. It is not a highway, or *any* highway, but *the* highway, that is, the same highway mentioned before.

There is no evidence that the highway crossed by the animals was an intersecting highway, and unless the words " or otherwise " make the sub-section applicable to the present case I think the plaintiff cannot recover.

I think, however, that those words require us to uphold the judgment.

In my opinion those words, reasonably and fairly construed, mean *at large upon the highway, or at large in any other way or place.* They widen the meaning so as to embrace the circumstances in which these animals were. They were at large, first upon the highway parallel to the railway, and afterwards in the neighbouring field, from which they passed upon the company's line.

There is no evidence that they got at large through any negligence or wilful act of the plaintiff or his agent, or of their custodian or his agent, and the sub-section makes the fact that no one was in charge of them immaterial.

The appeal should be dismissed with costs here and below.

DUFF. J., concurred with MACLENNAN, J.

Appeal dismissed with costs.

Solicitor for the appellants: *J. A. M. Aikins.*
Solicitor for the respondent: *Gregory Barrett.*

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ANIMALS AT LARGE — NEGLIGENCE OF OWNER — EVIDENCE.

ALBERTA.] [HARVEY, J.

BECKER v. CANADIAN PACIFIC R.W. CO.

(5 *West. L.R.* 569.)

Railways—Animal killed on track — Liability of railway — Railway Act, 1903, sec. 237, sub-sec. 4—Animals at large through negligence of owner—Absence of evidence that horses killed by a train.

Plaintiff's horses were found by defendants' section foreman on their right of way about a quarter of a mile from a highway crossing. The fences were in good repair and so were the cattle guards at the crossing prior to a snow storm which filled them up. The horses were killed after the snow storm.

There was no evidence as to how they came to their death nor any evidence of external violence. It was shewn that the horses were put in pasture at a distance from the plaintiff's residence without any one being left in charge and in such a position that they might easily have escaped.

Held, that the plaintiff could not recover as the horses were at large through his negligence or wilful act or omission.

Action to recover the value of two horses alleged to have been killed by a train of the defendants, the claim being made under sub-sec. 4 of sec. 237 of the Railway Act, 1903, which is as follows:—

"When any cattle or other animals at large upon the highway or otherwise, get upon the property of the company and are killed or injured by a train, the owner of any such animal so killed or injured shall be entitled to recover the amount of such loss or injury against the company in any action in any Court of competent jurisdiction, unless the company, in the opinion of the Court or jury trying the case, establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent; but the fact that such animal was not in charge of some competent person or persons shall not, for the purpose of this sub-section, deprive the owner of his right to recover."

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J. E. Varley, High River, for plaintiff.
R. B. Bennett, Calgary, for defendants.

December 10, 1906. HARVEY, J.:—On behalf of the defendants it is objected that there is evidence that the horses were killed by a train of the defendants, and also that the evidence shews that the horses were at large through the negligence of the plaintiff. The evidence discloses that the horses in question were found by the defendants' section foreman on the defendants' right of way about a quarter of a mile from a highway crossing, that the fences were in good repair, and that the cattle-guards at the crossing were in good repair prior to a snow storm after which the horses were found and which filled the guards up. They were not identified by the plaintiff as his until several weeks after; and in the meantime the section foreman had advertised them in the post office. There was no evidence as to how the horses came to their death, nor any evidence of any external violence, and I have very grave doubts whether an inference that the horses were killed by a train could be justified.

In McMillan v. *Manitoba and North-Western R.W. Co.*, 4 Man. L.R. 220, witnesses' attention was called to a train by hearing it whistling the alarm for cattle. It then stopped 100 yards from the place where the first of the cattle were found, and remained standing and whistling for a short time, during which witnesses heard "some loud talk and swearing as to cattle being on the track," and then it started slowly, the engine still whistling, and then stopped again after having passed the place where the cattle were found. The whistling then ceased. The cattle were found badly injured a couple of hours later, having been last previously seen the night before. The Court held that there was no evidence that the injury was done by this train. Without expressing concurrence with that judgment, it appears to me that the necessary inference in that case would be more justifiable than in the present case.

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I was at first of opinion that the fact of the defendants' employee advertising the fact of the death of the animals could be treated as evidence of the killing by the train, in view of the provisions of chapter 83 of the Consolidated Ordinances of 1898, requiring notice in the event of stock being killed by a train; but a reference to that Ordinance shews that the notice was not by the officer nor in the manner prescribed by the Ordinance, and it appears to me, therefore, that it cannot be so treated. I do not, however, consider it necessary to decide this point, because I am of opinion that defendants must succeed on the other objection.

The sub-section in question was originally a sub-section of section 194 of the former Railway Act, that section relating to the duty of a railway company to erect and maintain proper fences, cattle-guards, etc., and their liability for failure, now covered by section 199 of the present Act, while the other portions of section 237 are a continuation of section 271 of the old Act, and relate to the duty of owners of animals to keep such animals off the highway near a railway and to the penalties for breach of this duty, which provisions, as has often been said by the Courts, are for the protection of trains and people travelling in them.

These two parts of the section at first glance, and their history, suggest two different purposes and an anomaly in their being joined in one section. There must, however, have been some reason for dissociating sub-section 4 from the section where it was originally found, and placing it in a section having a different purpose; and a more careful examination of the sub-section points to an interpretation consistent with the other parts of the section. The first three sub-sections impose conditions for the purpose of preventing accidents to trains by running into animals at the crossing of highways, but there is no provision for the much larger portion of the railways within the company's own land. Provision has been made for fences, cattle-guards, etc., having no doubt the double purpose of guard-

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ing trains and protecting owners of animals, and it appears to me that this sub-section may be reasonably construed as indirectly imposing on the company the obligation to take such other precautions as may be necessary to prevent animals getting on their land by making them liable for any injury caused by their trains. The alteration of the sub-section seems to support this view. Formerly, for the owner of an injured animal to recover, the burden was on him to shew negligence on the part of the company. Now, negligence on the part of the company is immaterial, and the company, to avoid liability, must shew negligence on the part of the owner, *prima facie* the company being liable. Having in view then the obligation imposed on the owner by the first portion of the section, the question to be determined is whether the evidence establishes such negligence on the part of the owner as disentitles him to recover.

The evidence establishes that some time at the end of summer or in the fall, the date being somewhat uncertain, but as far as can be fixed, about September, the horses in question were driven about 16 or 17 miles from High River, where the accident occurred, and placed in a pasture consisting of two sections of land. The evidence, which is that of the plaintiff and his son, is not very explicit as to the extent to which this tract of land was enclosed. It is clear, however, that on one side there was a river, while on the other sides, whether completely or not is not certain, it was fenced. There were road allowances running through the tract, across which there were wire gates of a certain fashion. The pasture was not the property of the plaintiff, but was used by different persons for pasturing animals in a general sort of way, it being necessary for people passing along the road or putting animals in or taking them out to open the gates. The road from the pasture to High River and the railway was fenced. The plaintiff had other horses in the same pasture, but no one was left in charge of them. His son, however, was in the habit of going out once or twice a week to look after them, apparently to see if they were

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all right. Some three or four weeks after the horses in question were placed there, it was discovered that they were missing.

Some inquiries and searches were made, but, apparently, no serious effort was made to find the horses, and on 28th or 29th November the horses were discovered by the defendants' section foreman dead on the defendants' right of way. This may have been very soon or may have been several weeks after they escaped, the evidence not being sufficient to say, since the plaintiff had no idea they were his horses until several weeks after they were found. If there were no duty on the plaintiff to keep his animals from getting at large, in as much as it is the custom of the country to allow animals to be at large, no negligence could be ascribed to him for the horses being at large, since his attempt to keep them in the pasture could be considered only as for his own convenience; but, inasmuch as the first sub-section of section 237 imposes on him, as regards the railway company and probably those travelling on the railway, the duty of preventing his animals from being at large, as far as the railway company are concerned, it was his duty to take reasonable precautions to keep his horses in confinement or under control. The going out to the place in question once or twice a week would be valueless to keep the animals in charge and could only be intended to guard against them getting far astray. It appears to me that the fact of the plaintiff considering it necessary to send some one out in this way shews that he did not consider them securely confined, and I cannot see how, on the evidence, any one would come to any other conclusion.

As I have said, I should not consider this negligence in the absence of any special duty; but, even if it were not negligence, it was the wilful or deliberate act of the plaintiff in putting the animals where he did that was the cause of their getting at large, if indeed they were not at large even in that pasture, and, therefore, they were at large through the negligence or wilful act or omission of the plaintiff, and thus come within the

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exception which excuses the railway company. The action is therefore dismissed.

NOTE.

For a discussion of the effect of sections 199 and 237 and the changes in the law brought about by the altered wording of these sections see Canadian Railway Act (Annotated), pages 312 *et seq.*, and page 455. The sections are now to be found in R.S.C. ch. 37, secs. 254, 294, 295 and 407.

ANIMALS AT LARGE—ABSENCE OF DUTY TO FENCE.

BRITISH COLUMBIA.] [FULL COURT.

MCDANIEL v. CANADIAN PACIFIC R.W. CO.

(13 *B.C.R.* 49.)

Railways—Railway Act, 1903 (*Dominion*), *sec.* 237, *sub-sec.* 4—"*Animals at large upon the highway or otherwise*," *meaning of*—*Sec.* 199—*Pleading—Amendment.*

Plaintiff's animals were set at large to pasture in the open country, and were killed at a place where the company was not bound to fence:—
Held, that he could not invoke the aid of section 237, sub-sec. 4 of the Railway Act, 1903.
Decision of Forin, Co. J., affirmed, Martin, J., dissenting.

APPEAL from the judgment of Forin, Co. J., in two consolidated actions tried before him at Nelson on the 27th and 28th of November, 1906.

The plaintiff claimed damages for the loss of certain animals, killed on the track of the defendant company. At the trial the learned County Judge found that the land adjoining the track where the animals were lost, for some four or five miles is not settled, improved and enclosed land, and that the plaintiff had allowed the animals to run on this land without attempting to

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control them. His Honour, therefore, held that plaintiff could not recover under section 199 of the Railway Act, 1903, on account of the company's neglect to fence, nor, having allowed his cattle to run uncontrolled, could he invoke section 237.

The appeal was argued at Victoria on the 16th of January, 1907, before Martin, Morrison, and Clement, JJ.

S. S. Taylor, K.C., for appellant (plaintiff) cited section 237, sub-section 4 of the Railway Act, 1903 (Dominion). The phrase "animals at large"; see *Arthur* v. *Central Ontario R. W. Co.* (1906), 11 O.L.R. 537; *Bacon* v. *Grand Trunk R.W. Co.* (1906), 12 O.L.R. 196.

Davis, K.C., for respondent (defendant company). The passing of section 237 does not affect the Canadian Pacific Railway; we are governed by the Act of 1879.

Taylor, refers to respondent's dispute note. This point was not raised at the trial. We are relying on the Railway Act of 1903, and he cannot be allowed now to raise his charter when the point was not raised before.

Davis: Either at the trial or an appeal if there is a point as to which no question of fact arises, the Court will allow an amendment. There is no question of fact here: see *Stilliway* v. *Corporation of City of Toronto* (1890), 20 O.R. 98.

It is not negligence on the part of the railway if cattle are killed when the owner allows them to get on the track: *Canadian Pacific R.W. Co.* v. *Eggleston* (1905), 36 S.C.R. 641. Also see sections 190, 198, 199, 200, 201 and 237. The Court must look at all these sections when dealing with the protection of the railway and live stock. Section 237 applies to horses or cattle killed on the track, assuming of course that they are killed at a place where the company is bound to fence. Here we were not bound. See *Arthur* v. *Central Ontario R.W. Co.* (1906), 5 Can. Ry. Cas. 318; *Bacon* v. *Grand Trunk R.W. Co.* (1906), ib. 325.

Taylor in reply.

Cur. adv. vult.

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23rd March, 1907. MARTIN, J.:—On this appeal from the County Court of West Kootenay, the respondent seeks to set up for the first time two defences which were not among the many defences raised by the lengthy amended dispute note in the Court below, nor was any application ever made to that Court for leave to further amend so as to raise them. One of these proposed defences is the alleged "negligence or wilful act" of the plaintiff under section 237, sub-section 4 of the Railway Act, 1903; and the other is that under the defendants' special charter, no general railway Act since 1879 has any application to it, and consequently it is exempt from the liability sought to be imposed on it by said section. This is the same point which is now standing for further argument before this Court on an appeal from my judgment in the *Northern Counties Trust Investment, Ltd.* v. *Canadian Pacific R.W. Co.* The appellant objects to these defences being now raised as being a contravention of the statutory County Court Rule No. 159 under section 165 of the County Courts Act as follows:

"No defendant, whether by original action or counterclaim, shall be entitled to use or rely upon any ground of defence, set-off or counterclaim other than those stated in the dispute note or reply, without the leave of the Judge, to be granted upon such terms (if any) as may appear just."

This, as I said in *Gelinas* v. *Clark* (1901), 8 B.C.R. 42, 1 M. M.C. 428, is "a useful rule" and has frequently been given effect to. In that case it was applied by this Full Court (McColl, C.J., Irving and Martin, JJ.), even to a question of jurisdiction open on the face of the record, as well as to a question of fact, abandonment. The learned counsel for the present respondent there took the ground that "if the objection to jurisdiction is not taken in the dispute note, it is waived." It is unnecessary to allude here to the cases I noted at p. 433, but it is proper to point out that the decision in *Gelinas* v. *Clark* was again and recently approved, and followed by this Court in *Gabriel* v. *Jackson Mines, Ltd.*, unreported, decided on November 9th, 1906, by Irving, Martin and Morrison, JJ., wherein an

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application to raise for the first time on appeal (from the same Court now appealed from) several questions of fact and of law going to the whole root of the matter was unanimously refused. I then in substance said as explanatory of the above decisions and of our ruling in that case: " This is not an appeal from a Court of original jurisdiction but one of statutory and inferior jurisdiction, and the rule has been treated by us as different, even as to a waiver of jurisdiction. The County Court is supposed to be a poor man's Court and finality and expedition are aimed at."

This Court has laid it down in *Jordon* v. *McMillan* (1901), 8 B.C.R. 27 at p. 28, that it is bound to follow its own decisions (see also *Clabon* v. *Lawdry* (1898), 2 M.M.C. 38), and I am unable to perceive why a defendant should now be allowed to set up at the eleventh hour a railway statute when he would not heretofore have been permitted to invoke, say, the Statute of Frauds, or of Limitations, and consequently I am of the opinion that the present defendant (respondent) should be, as others similiarly situated have been, confined to the record since he neglected to apply to the learned Judge below for the necessary amendment.

During the hearing below the plaintiff's counsel repeatedly refused to be drawn into the question of negligence, as is shewn, e.g., on pp. 59, 60, 61, 63, 64 and 65 of the appeal book, and though the defendants' counsel did apply to amend the pleadings if necessary on the one point of " injury sustained by reason of the construction of the railway," he refrained from doing so on any other, which supports the appellant's present attitude. Such being the case, I do not think this Court should be drawn into a speculation regarding evidence which might have been given on non-existent issues. The appellant's counsel assured us that if negligence had been in issue he had other witnesses to call, and I do not see how in the circumstances we can refuse to accept this statement. The case of *Stilliway* v. *Corporation of City of Toronto* (1890), 20 O.R. 98, cited by the respondent, does not support his contention, for leave was there

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asked for; and further it was not a County Court case. I have not overlooked the remarks of Mr. Justice Duff in *Stone* v. *Rossland Ice and Fuel Co.* (1906), 12 B.C.R. 66, but in the first place they are *obiter dicta* for the point was not raised or mentioned on that appeal; and, in the second place, he does not refer to the special practice of the County Court.

I turn then to the sole remaining question, viz.: the meaning and effect of the words " or otherwise " in said sub-section 4. Now if I were called upon to construe for the first time this language in the light of all the sub-sections of section 237, which stands by itself under the heading " Animals at large " I should not hesitate to put upon it that meaning which seems to me to be the manifest intention of Parliament, viz.: " Animals at large upon the highway or otherwise at large." In the case at bar this construction includes the plaintiff's animals and he would be entitled to recover if the company did not establish the defence open to it under the latter part of the section. This section came into force on February 1st, 1904, and several cases on it have been cited to us, decided in the following chronological order—*O'Donovan* v. *Canadian Pacific R.W. Co.* (Jan. 10, 1906) per Cumberland, Co. J., of Minnedosa, Manitoba; *Arthur* v. *Central Ontario R.W. Co.* (March 10, 1906), 11 O. L.R. 537, 5 Can. Ry. Cas. 318; *Bacon* v. *Grand Trunk R.W. Co.* (May 1, 1906), 12 O.L.R. 196, 5 Can. Ry. Cas. 325; and *Carruthers v. Canadian Pacific R.W. Co.* (Oct. 22, 1906), 4 West. L. R. 441.

The first of these cases is a County Court decision in favour of the defendant company; the second and third on the facts as there given support the plaintiff's contention; while in the fourth there is much that the defendant is entitled to rely on. Seeing that there is such a conflict of authority in Courts whose decisions are not even binding on us, the only thing to do is to give effect to my own opinion as above stated. All the Courts are agreed in one thing, viz.: that Parliament has been for years extending the liability of railway companies in this respect, and the only question is as to the extent it has gone.

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There has, to my mind, been a change in the law which must be recognized, and I cannot see that the clear liability imposed by the new sub-section can be cut down by reading it with section 199 so as to restrict its application to cases where there is a liability to fence. The omission of the words " or otherwise " after " highway " in sub-section 1 and the unqualified expression " got at large " in the eighth line of sub-section 4 support this view. " If," as was said in the Bacon case, " the law presses too hard upon the railway companies it is for the Legislature to interfere."

It follows that the appeal should be allowed with costs.

MORRISON, J.:—I entirely agree with the judgment of the learned County Court Judge. The plaintiff's own evidence shews conclusively that he exercised no kind of supervision or control over his horses and cattle. It goes further and in my opinion precludes any chance of there having been a breach on the part of the defendant of any statutory obligation which led to or caused the accident.

Having regard to the scope of the Act I would fancy that there is a duty cast as well upon the plaintiff as upon the defendant to safeguard the travelling public from accidents of this kind.

I would dismiss the appeal.

CLEMENT, J.:—I would dismiss this appeal.

Mr. Taylor admits his inability to sustain these (consolidated) actions otherwise than under sub-section 4 of section 237 of the Railway Act. It seems to me that the plaintiff's own evidence shews that the animals killed were at large through the wilful act of the plaintiff himself. He had no enclosure upon his own place within which to keep these animals; he simply turned them loose to pasture on the unfenced countryside. This is perhaps not a case of animals at large through the " negligence " of the owner; but these animals clearly " got " at large through the plaintiff's " wilful act " in turning them

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loose as I have said. The plaintiff's own evidence shewing this, it seems idle to discuss where the onus lies. It can scarcely be seriously contended that the defendants should prove the fact over again by evidence formally called for the defence.

I express no opinion upon the point taken by Mr. Taylor that the words "or otherwise" near the beginning of the section are to be construed as meaning "or otherwise at large." I simply assume in his favour that this is the correct interpretation of those words. If they mean "or otherwise upon the highway," as Mr. Davis contends, the plaintiff could not invoke the section at all, as there were no highways in the locality in question here. Nor would it be proper to express any opinion upon the contention put forward by Mr. Davis that the sub-section in question cannot apply except in localities where there is the statutory obligation to fence under section 199. I base my decision solely upon this: that assuming sub-section 4 to apply, the plaintiff's own evidence puts him out of Court. And, with all deference, I find myself unable to concur in the view expressed by my brother Martin that the defendants should not be allowed to urge this defence. It seems to me that the judgment of the learned County Court Judge really proceeds upon the same ground as that upon which my opinion is based and all such amendments of the record must, I think, be taken to have been made as were necessary to present the point upon which, as I have said, the judgment below really proceeded.

Moreover, in this particular case, there can be no pretence of unpresented testimony which might by any possibility shew the facts to be other than they now appear upon the record (I mean of course, as to this particular point), and I must confess my mind revolts at the idea of allowing this plaintiff to take money from the defendants' pockets to which he is, on his own shewing, not by law entitled.

Appeal dismissed, Martin, J., dissenting.

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CATTLE KILLED ON RAILWAY—OWNER'S NEGLIGENCE.

QUEBEC.] [CURRAN, J.
[COURT OF REVIEW.

BOURASSA v. CANADIAN PACIFIC R.W. CO.

(*Q.R.* 30, *S.C.* 385).

Liability for tort—Act of Parliament of Canada—Railway Act—Loss of cattle straying on railways—Liability of railway companies—Negligence—Wilful act or omission of owner of cattle.

Held, under sub-sec. 4 of sec. 237 of the Railway Act, 1903, 3 Edw. VII. ch. 58, an Act of the Parliament of Canada, which provides that railway companies shall be liable for the loss of cattle killed on their roads except when it is proved that such cattle "got at large through the negligence or wilful act or omission of the owner or his agent" no liability whatever is incurred by the company for contributory negligence or otherwise when the case falls within the exception.

PRESENT:—Taschereau, Pagnuelo and Saint Pierre, JJ.

The judgment under review was rendered in the Superior Court, Curran, J., on the 16th of February, 1905, as follows.

CURRAN, J.:—Whereas plaintiff alleges that at the parish of St. Phillippe in this district, on the 12th of January, 1905, at about eleven o'clock in the forenoon at the place where the public highway leading from St. Phillippe de Laprairie is traversed by the railway of the defendant, a freight train passing said point struck and killed a two year old mare belonging to plaintiff, of the value of $90.00 and wounded another mare belonging to him causing a damage of $50.00.

That the said animals had left their enclosure and were being followed by plaintiff and his servants who would have succeeded in capturing them on the public highway if the railway of defendant had been provided with culverts or other obstructions required by law to prevent animals from going on the track.

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That in consequence of such omission on the part of defendant, said mares of plaintiff ran along defendant's track where they were run over by the train of cars, which the employees of defendant might have avoided if they had stopped said train as they could well have done before reaching said point where the damage was done.

That the said damage to plaintiff occurred through the fault of defendant's employees and of the defendants themselves; in the first instance by the fault of said employees in not stopping said train of cars and in the second by the absence of culverts and other obstructions as aforesaid and plaintiff brings suit for the sum of $140.00.

Whereas defendants plead as follows:

That the accident in question was solely due to the negligence of the plaintiff or his representatives in permitting the horses to get loose and to run at large on the public highway to the railway track.

That the horses got at large through the negligence and wilful act and omission of the plaintiff or his representatives who permitted the said horses to be loose in a yard from which the gate had been removed and neglected and omitted to attach them or otherwise keep control of them.

That if it had not been for the fault and negligence of the plaintiff or his representatives as aforesaid, no accident could have occurred.

That the railway track was in the proper and usual condition in every respect and the train in question was conducted and equipped in the proper and usual manner.

That the action in question was not due to any fault or negligence on the part of the defendant or its representatives, but was unavoidable in so far as they are concerned.

That the plaintiff has not suffered the damage claimed.

That the defendant is not indebted to the plaintiff in any amount for any cause or reason whatever.

Considering that defendants have proved by the evidence

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of plaintiff himself that the said animals escaped from his own land and reached the highway and thence on the track of defendants by his own fault, in not having any gates or something therefor, on his own property, to prevent said animals from going out of his enclosure. After they had passed the first chain, then that there was a gateway which plaintiff left opened without any protection whatever.

Considering that defendants have proved that they are entitled to the benefit of sub-section 4 of section 237 of the Railway Act, 1903 (3 Edw. VII. ch. 58), having proved the fault of plaintiff through said negligent omission.

Considering that the said animals were on the railway track of defendant by the fault of said plaintiff.

Considering that the evidence discloses that the engine and freight cars of the defendants were at a distance of three acres from the said animals of plaintiff when they got on said railway track and that defendants' servants had ample time to spare to stop the train which was going at a very moderate rate of speed before reaching said animals.

Considering that defendants and their servants are bound to use the franchise which they enjoy prudently and that they have no right so to exercise their privileges to the unnecessary injury to any one.

Considering that said animals were injured or killed by the common fault of plaintiff and defendant and each in a like degree and that each must bear an equal proportion of the damage.

Considering that said plaintiff has proved the damage alleged $140.00.

Doth adjudge and condemn defendants to pay and satisfy unto plaintiff the sum of $70.00 with interest from the date of the institution of this action and costs of Circuit Court.

Judgment in review.

September 29, 1906. TASCHEREAU, J.:—In this case, although the amount of condemnation is very small indeed, the question

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at issue is of great importance especially to the defendant, and to the other railway companies of this country.

The facts of the case are not disputed, and may be summarized as follows: The plaintiff is a farmer living in the parish of St. Phillippe. On the 12th January, 1905, two unbroken colts belonging to the plaintiff, two years and three years old respectively, escaped onto the public road from the plaintiff's land, owing to the fact that the plaintiff's gates had been removed for the winter season, and the colts were only followed by an eight year old boy, and were without halters or any other means of restraint. They ran onto the railway track where one of them was killed, and the other injured by a passing train. The plaintiff himself had been in the habit of taking the colts each morning from the barn to a well some distance away, to water them. They were quite unbroken and could not be led by means of a bridle.

The day before the accident, the plaintiff had commenced to thresh his grain by means of a threshing machine in one end of the same barn in which the colts were kept, and on the morning of the accident, as he was busy at the threshing machine, he let the two colts out of the stable, and instead of taking them himself, he sent his eight year old boy along with them, to the well, where his wife was busy drawing water. The child followed the colts to the well, and was alone following them back towards the stable, when they took fright at the unusual noise of the threshing machine, or for some other reason, and the little boy, of course, had no control over them. The colts ran to the gate of a field in which the barn and the well were situated. The gate itself had been previously removed, and a chain had been hung in the opening. The colts ran against this chain and knocked it down. They then ran across another field belonging to the plaintiff in which his house is situated, and through an open gate which leads from that field onto the public road. This gate had also been removed by the plaintiff shortly before the day of the accident. The colts then ran down

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the public road to the railway crossing, and apparently because the railway track was freer from snow than the highway, they turned onto the track just as the train was approaching. The cattle guards had been removed for the winter, as usual. The train struck the colts at about an acre and a half distance from the crossing. It was a heavily loaded freight train, and necessarily took some distance to stop.

The trial judge found that the plaintiff has established damages to the extent of $140.00 but reduced that amount by half on account of his finding that the accident was due to contributory negligence on the part of both parties.

Now, the question before us lies in the interpretation of sub-section 4 of section 237 of the Railway Act, 1903, (3 Edw. VII. ch. 58) which is new law, but was in force at the time the plaintiff's cattle were killed and injured, and which reads as follows: "When any cattle or other animals at large upon the highway or otherwise, get upon the property of the company and are killed or injured by a train, the owner of any such animal so killed or injured shall be entitled to recover the amount of such loss or injury against the company in any action in any Court of competent jurisdiction, unless the company, in the opinion of the Court or jury trying the case, establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent."

Therefore any wilful act or omission on the part of the owner or his agent, is sufficient to destroy his right of action altogether. The learned Judge in the Court below found that the plaintiff had established damages to the extent of $140, but he reduced the amount by one-half on account of his finding that the accident was due to the contributory negligence on the part of both parties. Now, that is common law only, but we are now under the special law regulating the rights of railways and of proprietors. This is a special act, specially passed, by Parliament, which has a right to pass it, and it enacts special provisions which are at variance with the common law, but

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which are very clear in themselves, and this can bear no other interpretation than the strict interpretation to be given it.

The question is not new. It has been decided in that sense already by the learned Judges of this Court, probably by De Lorimer, J., on the 12th of March, 1906, is a case of *Coulombe* v. *The Canadian Pacific R.W. Co.* Also by Mr. Justice Liddell in the Second Division Court of the United Counties of Stormont, Dundas and Glengarry on the 24th January, 1905. So that there cannot be any doubt as to the interpretation to be given. If there was any doubt, all the judgments cited are in the same sense. There is not a single judgment interpreting the clause in any other way. All the judgments pronounced on the new law, have been pronounced in that sense only, so that we must hold that the jurisprudence is universal and general, and therefore that the learned Judge in the Court below has erred in dividing the amount of condemnation between the defendant and the plaintiff on account of the fault being common. There can be no common fault when the owner is in fault himself, he has no action.

Whether the company be at fault even in a large measure, the moment the owner is found at fault he has no action. Well, there is no doubt in this case that the owner was at fault. He was at fault first, in having removed his two gates—the first gate mentioned in the judgment, and the second gate near his house where the animals finally escaped onto the public highway, and not replacing them properly. The first gate was replaced only by a simple chain, which necessarily unloosened or broke loose by the colts pressing against it. There was certainly fault there, and there was a second fault in the act of the plaintiff in confiding the care of his colts to a young child of eight years of age, without going himself, on the morning in question, especially as he was in the habit of going every day. There was a fault there. Well, that fault being acknowledged by the judgment, and being undoubtedly proved by the evidence, there follows only one conclusion, and that is, that the plaintiff has

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no action at all, and the action ought to have been dismissed, instead of the amount of condemnation being divided between the parties.

The judgment is therefore reversed and action dismissed.

Pelletier & Letourneau, for the plaintiff.

Campbell, Meredith, Macpherson & Hague, for the defendant.

FARM CROSSING—AGREEMENT—RAILWAY COMMISSIONERS.

ONTARIO.] [COURT OF APPEAL.

MCKENZIE v. GRAND TRUNK R.W. CO.
DICKIE v. GRAND TRUNK R.W. CO.

(14 *O.L.R.* 671.)

Railway—Farm Crossings—Agreement—Maintenance—Rights of Land Owners —Application to Board of Railway Commissioners.

A railway constructed by the defendants' predecessors in title crossed the plaintiffs' respective farms. In 1854, when the line of railway was being laid down, bridges and an under-pass were constructed by the railway company to enable the owners of the farms to pass from one side of the railway to the other, and were for more than 50 years maintained and used in connection with the plaintiffs' farms, with the knowledge of the defendants and their predecessors in title, without any objection on their part:—

Held, on the evidence, that the bridges and under-pass were provided for and enjoyed by the plaintiffs' predecessors in title as part of the agreements or arrangements under which the defendants' predecessors in title acquired their right of way through the lands in question, and the defendants were bound by them. There could be no question of *ultra vires;* the subject matter of the agreements was within the powers and authority of the railway company in dealing for the acquisition of a right of way. The defendants were in the wrong in assuming to alter or reconstruct the bridges and underpass without the sanction of the Board of Railway Commissioners; and it was for them, and not for the plaintiffs, to apply to the Board.

Judgments of BOYD, C., and MEREDITH, C.J.C.P., affirmed.

Two actions were brought by Donald McKenzie against the railway company, and one action by Anthony M. Dickie.

In Donald McKenzie's first action he alleged that he was the

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owner in fee of farm lot 29, in the 3rd concession of the township of London, excepting thereout a strip conveyed by his father to the Great Western Railway Company on the 2nd March, 1853, upon which strip that company had constructed their railway in 1852; that the railway divided the north part from the south part of the farm; and that company, under whom the defendants claimed title to the strip, as they were by the statute in that behalf bound to do, built for the use of the owners of the farm a bridge or farm crossing over the tracks of their railway in 1852; that the Great Western Railway Company and the defendants from time to time repaired and maintained this bridge or farm crossing, and plaintiff and his predecessors in title had, ever since the construction thereof, used the bridge as a means of access and communication from the north to the south part of the farm; that the plaintiff was entitled to have the bridge maintained and repaired by the defendants and to use the bridge, and had used it for the purposes aforesaid for upwards of 50 years before the commencement of this action, as of right and without interruption; that on or about the 6th June, 1905, the defendants threatened to tear down the bridge and reconstruct it so as to increase the height thereof; that this action was begun on the 7th June, 1905, and subsequently thereto the defendants, without the consent or permission of the plaintiff, and well knowing that an interim injunction had been granted restraining any interference with the bridge, did partly tear it down, and left it in such a state that it had ever since been wholly unfit for use by the plaintiff. He claimed a mandatory order compelling the defendants to restore and construct the bridge; an injunction restraining the defendants from interfering with the bridge when reconstructed; a declaration that he was entitled to have the bridge maintained and repaired by the defendants as a good and efficient farm crossing; and $5,000 damages.

In Donald McKenzie's second action he made similar allegations and claimed similar relief in respect of an under-pass constructed by the Great Western Railway Company in 1852, under their tracks, where their line of railway severed the east half of lot 30 in the township of London, owned by him.

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These two actions were consolidated by order in Chambers.

In Anthony M. Dickie's action he made similar allegations and claimed similar relief in respect of an overhead bridge or farm crossing constructed by the Great Western Railway Company in 1852, over their tracks where their line severed lot 27 in the 3rd concession of the township of London, owned by him.

Dickie's action was tried before BOYD, C., without a jury, at London, on the 26th and 27th April, 1906.

T. G. Meredith, K.C., for the plaintiff.

W. R. Riddell, K.C., for the defendants.

At the conclusion of the trial, judgment was given orally as follows :—

April 27, 1906. BOYD, C.:—The first point is whether this injunction should be continued. I think that the proper course here is, to continue the injunction until the method of raising the crossing is settled either by written agreement of the parties, or by direction of the Railway Commission. The parties themselves have been dealing with that in view. The whole matter has been delayed pending an opportunity of going before the Railway Commission, and I cannot but believe that the Railway Commission will direct some sort of a crossing to be given there, equally convenient to that which now exists.

I do not think I need trouble myself about the nice question of law whether, with a clean sheet, and the first time of coming on the field, the railway company are obliged to give a crossing or not. They have given a crossing in this case for 50 years, and have kept it up and maintained and repaired it, and done with it according to the direction of this man, as he told them it was out of repair, and where there was a change in the roadway. By using higher cars, they have moved the bridge so as to suit that requirement, always giving him a good and satisfactory crossing. I cannot think that, at this stage of the history of the case, they are allowed to take down that bridge, and say they will give him nothing, and do what they will to it. I think his position is forti-

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fied, not only by the history of the case, but by the agreement; if not executed by the company, they have acted upon it, and they cannot repudiate the obligation contained in it, which means, speaking in a large and common sense point of view, to let him have the use of this bridge, and their conduct says they intended to keep it up, even if that could not be read into it. I think that is, by implication, always to be read into that which the company afterwards did, and their conduct has explained since, if it were necessary to shew what that, perhaps imperfect agreement, *per se*, does really indicate. So that is the first point to be determined.

As to the damages, there are several matters to be considered. First of all, there has been a breach of the injunction which was granted the 14th July, 1905, pending the action in September, 1905, when the railway officers had knowledge of it. There was a deliberate going against the order of the Court, in the hope, perhaps, that they might not do much damage, but there was the proceeding with the knowledge that the injunction was granted, and Mr. Brownlee tells us frankly and properly enough in the box to-day that had he known that an injunction had been granted he should not have allowed this bent to be taken out. The under-strappers went out, and the company, of course, had to shoulder the responsibility of their workmen's undertaking when they made this change. The structure should have been left as it was. If there was any such urgent necessity as is stated to get the double track there, they should have applied to the Court, submitted plans, and taken this plaintiff into their confidence, so that he might not have been prejudiced by their *ex parte* action; but with a high hand, especially when the order of the Court was prevailing, they proceeded to take down the bridge, though Mr. Brownlee in his affidavit states that he agreed with the other man that the bridge was not to be touched until an agreement was made with Dickie. They not only touched it, but altered it. Mr. Brownlee says he does not think it has been altered. The defendants say it is a good, safe bridge, strong, and ought to be accepted. It is not the same bridge that he had there. But in comparison with the former a suspension bridge is put in. The man does not want a

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suspension bridge; he does not want any erection of that kind, which vibrates and which is unsatisfactory. If there was a river to cross, where it could not be bridged in any other way, I suppose he would have to take it. He had not a suspension bridge before, and he does not propose to exchange this stable bridge for anything like a suspension bridge. He wants a suitable, comfortable structure that he can travel on without being in a state of nervous anxiety all the time, according to the state of the weather, and the condition of his horses and cattle, as to whether or not he is going to get safely across. It is bad enough to have to cross an overhead bridge, with railway trains going below every 15 minutes, but to have a bridge that is unstable, deflecting, as Mr. McDougall, one of the defendants' witnesses says, a great deal, and vibrating, as Mr. Farncomb said, tremendously. Why should a man be exposed to that? Therefore it is not a structure at all equal to what he had. It is a mere sort of experiment put up. That is a temporary expedient to tide over until they went before the Railway Commissioners, not deeming that they were going against the order of the Court, and violating, I think materially, the rights of this man. There has been a breach of the injunction. Penalizing consequences might follow. I do not propose inflicting anything more serious than the circumstances of the case require. This man has been prejudiced; his plans of work have been disturbed. He has planned to cut wood in the winter with this traction engine, and supply himself in that way; to take over manure in quantities, and he found that all his plans were frustrated. He could not get this engine over. He was afraid to drive cattle on the bridge. He was not to spend his time educating his horses and cattle to go over that new structure; take over half loads, and be in doubt whether he would get over safely. He is not to be exposed to these things. He was advised against using that for heavy cattle. There would be trepidation on his part in going over with loads. He was not to take an engine over there and run consequences. To drive cattle over there and have the consequence of them breaking down the bridge, and be dragged down himself and be injured. It has been proved here by the experts on the part of

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the defence that it is safe to go over there. How has it been arrived at? It has been arrived at by the expenditure of a great deal of money; a great deal of expert testimony; a great deal of evidence collected, and against that evidence is another expert, Mr. Connor, who says it is not safe. Even if it is demonstrated that there is sufficient strength, and he might safely use it, why should he be at the expense of ascertaining all that? He had to go to this expense to satisfy himself.

The railway company have disturbed the status. They have made all this trouble, and now they say it is just as good as ever. It is strong enough, drive ahead; we will guarantee you can take that traction engine over safely. If they set to work and took it over, and you could look at them while they were doing it, it would be different. He does not propose to run the risk himself, and I think he is quite right. He swears to $250 damages. I do not think it is a case to weigh his damages with nice scales. The plaintiff has been seriously disturbed. The railway company have violated the order of the Court, and I think, although I do not impose penalizing consequences, I think they should at least compensate him for this amount, $250. I give him that. Then their injunction and the costs of action. And the action is retained meanwhile, with liberty to apply for further damages if the situation is not bettered before further damages should be incurred.

McKenzie's consolidated actions were tried before MEREDITH, C.J.C.P., without a jury, at London, on the 13th February, 1906.

T. G. Meredith, K.C., for the plaintiff.

W. R. Riddell, K.C., for the defendants.

May 16, 1906. MEREDITH, C.J.:—Since the trial, a similar action, *Dickie* v. *Grand Trunk R.W. Co.*, has been disposed of by the Chancellor, and I have had an opportunity of reading the reasons for his judgment in favour of the plaintiff which were given by that learned Judge.

Following that case, I must hold that the plaintiff was entitled of right to the overhead bridge and way and the under-pass which are in question, and that the defendants were wrong-doers in

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removing them or altering their condition without the authority of the Dominion Board of Railway Commissioners.

The existence of the unsigned agreement in the *Dickie* case, and the absence of that feature in this case, do not seem to me to make less applicable what I understand to be the principle of the decision in the *Dickie* case, viz., that after the lapse of the very long period during which the plaintiff had enjoyed as of right the overhead crossing, and the circumstances under which it was dealt with during that period, the presumption arose that the enjoyment of the right was a part of the arrangement under which the predecessors in title of the defendants acquired their right of way through the lands of the plaintiff.

The result of this conclusion is that the plaintiff is entitled to damages for the injury done to him by the acts of the defendants, which I have held to be wrongful. These damages are not to be confined to the loss sustained up to the present time, but if the plaintiff is in a position to shew that the value of his land is lessened by the substitution of the means of crossing which the defendants have provided, for the means to which he was entitled, that will be one of the elements making up the damages which are to be awarded to him, and there will be a reference to the Master at London to assess the damages.

The defendants must pay the costs of the action, including those of the motion for injunction.

The defendants appealed to the Court of Appeal in both cases, and the appeals were heard by Moss, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A., on the 23rd January, 1907.

Wallace Nesbitt, K.C., for the defendants. The defendants are not bound to maintain a bridge or an under-pass at all, and certainly not in the manner insisted upon by the plaintiffs. The railway in question was constructed under legislation passed before 1851. Therefore, the provisions of the 14 & 15 Vict. ch. 51, sec. 13, which gave for the first time the right to a farm crossing, do not apply. But, even if that Act did at any time apply to this railway, that was done away with by C.S.C. ch. 66: see *Brown* v. *Toronto*

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and Nipissing R.W. Co. (1876), 26 C.P. 206; *Vézina* v. *The Queen* (1889), 17 S.C.R. 1; *Guay* v. *The Queen* (1889), *ib.* 30. The Act of 1888, 51 Vict. ch. 59, sec. 191, has been held not to apply to railway companies such as that in question: *Ontario Lands and Oil Co.* v. *Canada Southern R.W. Co.* (1901), 1 O.L.R. 215; *Carew* v. *Grand Trunk R.W. Co.* (1903), 5 O.L.R. 653. No right to have the bridge and under-pass maintained can arise from prescription: *Canadian Pacific R.W. Co.* v. *Guthrie* (1901), 31 S.C.R. 155; *Grand Trunk R.W. Co.* v. *Valliear* (1904), 7 O.L.R. 364. In any case the plaintiff can be entitled only to a convenient passage; there would be no difficulty in giving a level crossing; the plaintiff has no right to lay down what kind of a crossing he is to receive: *Palmer* v. *Michigan Central R.W. Co.* (1903-4), 6 O.L.R. 90, 7 O.L.R. 87. There was no express agreement. If there was, it was *ultra vires* of the railway company. They have only a qualified right, and the public must be considered. The Board of Railway Commissioners might decide against a high level crossing or say it must be at some other place. It is for the plaintiffs to apply to the Board if they wish the ways to be maintained. Reference to the legislation on the subject of crossings and to the following cases: *Hugo* v. *Great Western R.W. Co.* (1858), 16 U.C.R. 506; *Carroll* v. *Great Western R.W. Co.* (1857), 14 U.C.R. 614; *Reist* v. *Grand Trunk R.W. Co.* (1857), 6 C.P. 421; *Same Case* (1858), 15 U.C.R. 355; *Re Armstrong and James Bay R.W. Co.* (1906), 12 O.L.R. 137; *Knill* v. *Grand Trunk R.W. Co.* (1906), 8 O.W.R. 870; *Grand Trunk R.W. Co.* v. *Perrault* (1905), 36 S.C.R. 671, 681.

T. G. Meredith, K.C., and *D. A. McDonald*, for the plaintiffs. The railway in question was constructed under 16 Vict. ch. 101, assented to on the 22nd April, 1853, and therefore 14 & 15 Vict. ch. 51 applied to the construction of it, and by the provisions of that Act the defendants' predecessors in title were required to erect and maintain farm crossings for the use of the proprietors of the lands adjoining the railway: *Reist* v. *Grand Trunk R.W. Co.*, 15 U.C.R. 355; *Elliott* v. *Buffalo and Lake Huron R.W. Co.* (1858), 16 U.C.R. 289; *Studer* v. *Buffalo and Lake Huron R.W. Co.* (1866), 25 U.C.R. 160. The application of that Act was not

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removed by the Act of 1859, 22 Vict. ch. 1, secs. 6, 7, 9. The plaintiffs are entitled by prescription to have the bridges and under-pass maintained by the defendants. *Canadian Pacific R.W. Co.* v. *Guthrie*, 31 S.C.R. 155, and *Grand Trunk R.W. Co.* v. *Valliear*, 7 O.L.R. 364, hold only that a right cannot be acquired by prescription to an easement which it would be *ultra vires* of the railway company to grant. It was quite within the powers of the predecessors in title of the defendants to grant the easements claimed by the plaintiff. The *Guthrie* case does not apply, because here the plaintiffs are the owners of the lands on both sides of the railway. See *Vézina* v. *The Queen*, 17 S.C.R. at p. 22; *Grand Trunk R.W. Co.* v. *Perrault*, 36 S.C.R. at pp. 677, 681; Armour on Real Property, pp. 470, 471. The defendants were required by the Dominion Railway Act, 1903, sec. 203, to obtain the consent of the Board of Railway Commissioners before interfering with the bridges and under-pass, and the plaintiffs are entitled to claim the benefit of that section: Hardcastle's Statute Law, 3rd ed., p. 239 *et seq.*; Railway Act, 1903, sec. 294. In the *D'ckie* case the agreement is in existence, and in the other case it will be presumed: *Wells* v. *Northern R.W. Co.* (1887), 14 O.R. 594.

Nesbitt, in reply, reviewed the cases cited.

April 22, 1907. Moss, C.J.O.:—These two cases, though tried at different times and by different Judges, were argued together in this Court, the points involved being substantially the same in each case.

In the first-named case the (consolidated) actions are for the purpose of preventing the defendants from changing or interfering with a bridge and way over and across the defendants' line of railway, which intersects the plaintiff's farm from east to west, and also to prevent them from changing or interfering with an under pass, on another part of the plaintiff's farm, provided as a means of access under or across the defendants' line of railway, which intersects it from east to west.

In the other case the action is to prevent the defendants from changing or interfering with a bridge and way over and across the

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defendants' line of railway, which intersects the plaintiff's farm from east to west.

In each case the defendants, notwithstanding injunctions obtained by the plaintiffs, proceeded to alter the form and construction of the bridges and under-pass, and damages are claimed for the injuries thus occasioned.

The defendants' answer to the plaintiffs' complaints are the same in each case. They say that they were never under any obligation to construct any of the crossings in question, and, if the plaintiffs are entitled to require the defendants to retain the crossings or maintain others, they are obliged to obtain orders from the Board of Railway Commissioners under the provisions of the Railway Act, 1903.

It was shewn that the bridges and under-pass were constructed in the year 1854, at the time when the line of railway was being laid down or constructed over the plaintiffs' respective farms. At that time there was in existence legislation imposing on some, though, perhaps, not all, railway companies the duty of erecting and maintaining farm crossings of the railway for the use of proprietors of lands adjoining it. At all events, the Legislature had recognized the propriety of affording protection in this respect to land owners whose lands were crossed by railways. Whether the bridges and under-pass were constructed in the belief that the duty was upon the railway company, or because of an agreement between the company and the then proprietors of the lands, through whom the plaintiffs claim, it is the fact that the company did construct them, and that for more than 50 years they have been maintained and used in connection with the plaintiffs' farms, with the knowledge of the defendants and of their predecessors in title, without any objection on their part.

If there were agreements, the defendants are as fully bound by them to-day as were their predecessors at the time they were made. There could be no question of *ultra vires*. The subject-matter was one which was clearly within the powers and authority of the railway company in dealing for the acquisition of a right of way for their line of railway. And there is nothing in any of the

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cases cited or referred to that supports the proposition that in regard to a matter of this kind it is incompetent for, or beyond the authority of, a railway company to contract with a land owner. There is sufficient in the circumstances and the proved facts to fully justify the conclusions of the learned trial Judges that the bridges and under-pass were provided for and enjoyed by the plaintiffs' predecessors in title as part of the agreement or arrangement under which the defendants' predecessors in title acquired their right of way through the lands in question. That this is so in the case of *Dickie* is made apparent by the production of the agreement dated the 21st December, 1874, between George Dickie and the Great Western Railway Company, which recites the fact that the company, in the construction of their railway across the plaintiff's farm lot, severed it into two portions, and, for the purpose of enabling the owners or occupiers to pass and repass from the one portion to the other, a bridge was provided for farming purposes, and releases the company from all obligation to maintain or provide a bridge except the one now in question. This instrument was not executed by the defendants' predecessors in title, but at the time of the trial it was more than 20 years old, and was, therefore, evidence of the truth of the facts as therein stated: R.S.O. 1897, ch. 134, secs. 2 and 3. See also *Regina* v. *Guthrie* (1877), 41 U.C.R. 148. And it may fairly be inferred from the evidence in the *McKenzie* case that a similar agreement or arrangement was come to with his predecessors in title.

Upon this conclusion the defendants were in the wrong in assuming to interfere with the plaintiffs' rights, without the sanction and authority of the Board of Railway Commissioners. The circumstances of these cases do not warrant the contention that it lay upon the plaintiffs to apply to the Board. The defendants were seeking to disturb the *status quo*, and it was for them to make application in such a case.

And the plaintiffs were entitled to be protected in their rights as they existed until the defendants obtained the authority of the Board for their action.

The appeals should be dismissed.

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OSLER, J.A.:—I am of opinion that the appeals should be dismissed, for the reasons given in the judgments below.

MEREDITH, J.A.:—In order that the appellants may succeed in these cases, it is necessary for them to establish the novel, and somewhat startling, proposition, that there never was any power in them, or in their predecessors in title, to grant a right of way under or over their lands. Throughout the vicissitudes of the question whether railway companies were obliged to provide farm crossings, I do not think it was ever suggested that they could not contract to do so: my recollection is that, even in cases in which the obligation was negatived, the right to grant was upheld and given effect to; and in all cases and under all circumstances the obligation to afford a way of necessity seems to have been recognized. To give effect to such a proposition now would, in effect, be to upset the law as it has been for upwards of half a century supposed to be, and to upset innumerable transactions based upon that supposition, of which these very cases are apt examples. Why should railway companies not have always had such power to contract? They now not only have, but are clearly obliged to provide such crossings. What has there ever been to have prevented it? It has always been one of the more usual conditions upon which lands have been granted to railway companies for the purposes of their railway—one of the more usual considerations for the lands conveyed to them. The necessity of the thing almost demands it. It can hardly be conceivable that a railway company might cut in two innumerable farms, and thereby render portions of them of little value, if any, because of no convenient means of passing from the one part to the other, either under, over, or upon the railway. The thing would be preposterous—a burden which the railway companies would not be able to carry. Why should farms be rendered largely useless at their cost, and much less so at the owners' loss, for the want of a convenient way, which can always be given at no great expense, and no great risk to any one? Again I ask: what was there to have prevented the grant of the ways in question? My answer

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must be—nothing. And, that being so, the appeals fail; for where a grant is proved, it holds good; and where a grant is not proved, it is to be presumed to have been made, after upwards of half a century's user of the ways as of right, such as in these cases: see R.S.O. 1897, ch. 133, sec. 34. All turns upon the power —which I have no doubt the railway companies had—to grant such rights of way. If they had no such power, the actual grant would not avail, nor could any grant be presumed.

I have dealt with the question on principles generally applicable to railway companies in this Province; but it is proper to add, also, that, under legislation applicable to the predecessors in title of the appellants and which was in force for at least several years, they very clearly had the power to grant rights of way such as those in question, for that enactment required them to provide farm crossings; and, whether or not the part of the railway in question was actually constructed under it, they certainly had all the power which it conferred, and it might be well presumed that the grants were made under it, if there had been no other power to make them; and once so granted would hold good.

I would dismiss the appeals.

GARROW and MACLAREN, JJ.A., concurred in dismissing the appeals.

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CATTLE KILLED ON TRACK—FARM CROSSINGS.

BRITISH COLUMBIA.] [FULL COURT.

COEN v. NEW WESTMINSTER SOUTHERN R.W. CO.

(5 *West. L.R.* 214.)

Railway—Animal killed on track—Negligence—Fences—Farm crossing—Liability—Adjoining owners—British Columbia law.

Action for damages for a mare killed on the defendant's railway track while the mare was running at large, having presumably got upon the railway track at the farm crossing of a man named Morton at which there were cattle guards but no gates.

Held, Martin, J., dissenting, that in the absence of evidence that the mare was unlawfully at large at Morton's crossing, the railway company was negligent in not maintaining gates at Morton's crossing and that, according to the law to be administered in British Columbia, she was "not wrongfully on the railway" and the owner was entitled to recover.

Held, further, that the fact of farm crossings being provided with cattle guards instead of gates at the request of Morton the owner did not relieve the defendant from its statutory duty under the Railway Act to maintain gates at this point.

Decision of Irving, J., at the trial reversed.

APPEAL by plaintiff from judgment of IRVING, J., in favour of defendants in an action for the value of a mare alleged to have been killed on defendants' railway through defendants' negligence.

The appeal was heard by HUNTER, C.J., MARTIN, J., MORRISON, J.

Bowser, K.C., and *W. M. Gray*, for plaintiff.
Reid, for defendants.

Jan. 21, 1907. HUNTER, C.J.:—The defendants were incorporated by chapter 36 of the statutes of 1887, B.C., which Act was amended by chapter 36 of the statutes of 1889. By section 6 of the last mentioned Act, sections 194, 196 and 198, inclusive, together with others not material to mention, of the then Rail-

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way Act of Canada, being chapter 29 of the Railway Act, 1888, were read into the incorporating Act.

So far as material, these sections enact as follows:—

"194. When a municipal corporation for any township has been organized, and the whole or any portion of such township has been surveyed and sub-divided into lots for settlement, fences shall be erected and maintained on each side of the railway through such township, of the height and strength of an ordinary division fence, with openings or gates or bars or sliding or hurdle gates of sufficient width for the purposes thereof, with proper fastenings at farm crossings of the railway, and also cattle guards at all highway crossings suitable and sufficient to prevent cattle and other animals from getting on the railway. . . .

"2. A hurdle gate has proper fastenings if it is fifteen inches longer than the opening and is supported at each end by two upright posts:

"3. Until such fences and cattle guards are duly made and completed, and if after they are so made and completed they are not duly maintained, the company shall be liable for all damages done by its trains and engines to cattle, horses and other animals, not wrongfully on the railway, and having got there in consequence of the omission to make, complete and maintain such fences and cattle guards as aforesaid.

"196. After such fences, gates, and guards have been duly made and completed, and while they are duly maintained, no such liability shall accrue for any such damages, unless the same are caused wilfully or negligently by the company or by its employees.

"198. The persons for whose use farm crossings are furnished, shall keep the gates at each side of the railway closed when not in use; and no person any of whose cattle are killed by any train owing to the non-observance of this section, shall have any right of action against any company in respect to the same being so killed."

The trial Judge was of opinion that the legislature must be

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considered to have imported the Eastern decisions with these sections, but, with great respect, I am unable to agree. I do not think that the expression "not wrongfully on the railway" means not wrongfully according to the law of Ontario or Quebec or Manitoba, but according to the law of British Columbia; and, as the defendants did not shew that the mare was unlawfully at large by reason of some local by-law, or that the plaintiff was guilty of negligence or misconduct, we must assume that she was lawfully at large, which she might be under the conjoint provisions of the Animals Act and the Fence Act.

So far as the evidence shews, the mare and colt could only have got on the railway at Morton's crossing, as this was the only one of the three in question that was not provided with gates on both sides of the crossing, the rest of the line being fenced on both sides. There was no fence or gate on the west side of this crossing, which was the side next the Clover Valley road, a public highway, and I think the only reasonable conclusion is that the mare and colt got on the track at this crossing and strayed southwards, after having crossed over a cattle-guard that was not sufficient to stop them. And I do not think the fact that the mare was moving north towards this crossing when she was struck is enough to rebut the inference that she got on at this crossing, as the approach of the train might easily have turned her north.

Now, Morton's crossing being a farmer's crossing and not a public crossing, the statute required it to be either fenced off or provided with the statutory gates on both sides. The statute does not require cattle guards at such places, and the fact that such were put in by agreement with Morton does not relieve the company from the obligation they were under to the plaintiff to provide a fence or gate on the west side of the crossing.

I gather from the evidence that $250 would be a fair estimate of the value of the mare, and I would enter judgment for that amount with costs here and below.

MORRISON, J., concurred.

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MARTIN, J.:—To begin with, the question must be decided—how did the horse get on the railway track? The only inference fairly open to us from the meagre evidence is, to my mind, that drawn by the learned trial Judge, viz., that it got on from Morton's crossing.

This case, it is agreed, has to be decided on section 194 of the Railway Act of 1888, only, and not on the amendment thereof in 1890, ch. 28, sec. 2, which, as pointed out in the late case of *Carruthers* v. *Canadian Pacific R.W. Co.*, 4 West. L.R. 441, 6 Can. Ry. Cas. 13, 15 at pp. 442, 443, 448, 451, has really changed the law. It is too late now to depart from the construction placed upon the original section 194 by the Manitoba cases of *Westbourne Cattle Co.* v. *Manitoba and North Western R.W. Co.*, 9 Man. L.R. 501, and the Ontario decision of *Rathwell* v. *Canadian Pacific R.W. Co.*, 9 C.L.T. Occ. N. 413, in the County Court of Renfrew.

And, though it was truly said by appellant's counsel at this bar that the trial Judge erred in saying that our provincial legislature knew in 1888 of the *Westbourne and Ferris Cases*, the fact being that they were not then decided, nevertheless I think they should be followed for the reason mentioned by Chief Justice Howell in the *Carruthers Case*, p. 442. At the same time I feel that the question is a doubtful one, and I can quite believe that if it were brought before a higher Court, and freer than we are to consider the authorities *de novo*, other views might prevail.

The result is that on our said section it must be considered that the duty on the defendant company to fence was one it owed only to adjoining land-owners. Now, it is admitted that the plaintiff is not an adjoining land-owner, and there is a fifteen foot strip of Morton's property between the highway and the railway allowance, through which the horse obtained access thereto because of the lack of a gate. But to get over this point the appellant contends that the result of our British Columbia Animals Act, R.S.B.C. ch. 24, and the Fence Act, R.S.B.C. ch. 27, is to put him in as favourable a position as though the horse was

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there by permission of Mrs. Morton, who is an adjoining owner. On the other hand, it is urged that the effect of that section is to confer no rights upon the owner of the strayed animal, but simply that the trespass which in reality exists is condoned because the statute says that there shall be no penalty for it. It does not declare that it shall be lawful for animals to stray on to unprotected lands, but merely says if they are found there "no trespass shall be deemed to have been committed and no action for trespass shall be maintainable therefor." This seems to me to be the right view of the matter, because otherwise a land-owner finding a stray animal in his grain could not prevent it from doing further damage by driving it off. There is a well-known distinction between the sufferance of an unlawful act, and the existence of the right to recover damages therefor.

There remains then only the other point, that the circumstances here were such that the engine-driver was guilty of negligence in running down the horse, but, on the undisputed but incomplete facts of this case, that contention is answered by *Canadian Pacific R.W. Co.* v. *Eggleston,* 36 S.C.R. 641.

The appeal should be dismissed.

Appeal allowed; MARTIN, J., dissenting.

NOTE.

It will be observed that this case turned upon particular provisions of the Railway Act incorporated into a provincial charter granted to the defendants and that the decision is based upon the British Columbia Animals Act and Fence Act. Where these enactments are not in force it may be found that in a similar case in another province the decisions cited by Martin, J., in his dissenting judgment might prevent a recovery by the owner: See also *Yeates* v. *Grand Trunk R.W. Co., ante,* p. 4.

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HIGHWAY CROSSING—GATES AND WATCHMAN.

ONTARIO.] [BRITTON, J.

SOULSBY v. CITY OF TORONTO.

(15 *O.L.R.* 13.)

Negligence—Municipal Corporation—Public Park—Gate and Watchman at Railway Crossing—Injury to Person Crossing Track.

Within a public park maintained and controlled by the defendants, a municipal corporation, they erected a gate near a railway crossing, and kept a watchman to open the gate when there was no danger from passing trains, and to close it when trains were approaching the crossing. The plaintiff, driving through the park, desiring to pass through the gate to the highway beyond the railway, and finding the gate open, took that as an intimation that no train was approaching, and attempted to cross the railway, when he was struck by a train and injured:—

Held, that the defendants owed him no duty, and were not liable in damages for his injuries.

THIS was an action for damages for personal injuries sustained by the plaintiff, owing, as he alleged, to the negligence of the coporation of the city of Toronto, the defendants, in the circumstances stated in the judgment.

The action was tried before BRITTON, J., with a jury, at Toronto, on the 27th and 28th March, 1907.

J. M. Godfrey, for the plaintiff.

J. S. Fullerton, K.C., for the defendants.

April 30, 1907. BRITTON, J.:—On the 30th October, 1906, the plaintiff was employed as the driver of a baker's delivery waggon, and was delivering bread to customers in the western part of the city. On that day the plaintiff entered High Park, and drove along the road through the park, which leads out of the park, across the tracks of the Grand Trunk Railway and to the Lake Shore road. Within the park and near the railway crossing, the city has erected gates, and during the season when the park is most frequented, the city keep a watchman at the gate nearest the crossing, keeping it open for users of the road when there is no danger from passing trains, and closing it when trains are approaching this crossing. The statement of claim alleges that the

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plaintiff on the day mentioned was approaching the crossing along the road in High Park, intending to proceed to the Lake Shore road. When he arrived at the crossing, he found the gate open, and, relying upon that fact as notice to him that no train was approaching, he proceeded to cross the tracks, and while so crossing was struck by a train and seriously injured.

At the close of the evidence, counsel for the defendants asked that the action be dismissed, on the grounds that no actionable negligence had been shewn, and that the plaintiff was guilty of contributory negligence. It was then agreed that the only thing to be left to the jury was the assessment of damages, and that I should dispose of all other questions, subject to the rights of parties to appeal.

The jury assessed the plaintiff's damages, contingent upon his right to recover, at $1,000.

In my opinion, no duty was cast upon the defendants of erecting or maintaining the gate or of keeping the watchman at the crossing where the accident happened.

Here, as in *Moore* v. *City of Toronto* (1893), 26 O.R. 59 *n.*, "the principles which determine liability as for negligence are to be drawn from cases as to the permissive use of premises rather than those of invitation to use and come upon property of another." Many cases are cited—which emphasize the distinction. The report appears with *Schmidt* v. *Town of Berlin* (1894), in the same volume, beginning at p. 54, in which case it was held that the town corporation were not liable to a mere licensee for personal injuries sustained owing to want of repair of the building. In that case there was the express finding that the defendants had not knowledge at or before the accident that the building was in a dangerous condition, but that appears not to have been the determining factor in the case.

The people are allowed to use High Park and to use the roads made by the defendants in the park. If an accident had occurred because there was in the road a dangerous excavation, or upon it a dangerous obstruction, of which the defendants had actual or constructive notice, the case might have been different. Here the road itself is not complained of—the danger was by reason of

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something outside of and beyond the defendants' control. The accident was by reason of a moving engine upon the railway property, managed and controlled by the railway company. The road, since improved by the defendants, was originally, it is said, a farm crossing for the land now owned by the city and called "High Park." While it was a farm crossing, it was the duty of the railway company to erect and maintain fences and gates; and, as between the railway company and the land owners, the persons for whose use the farm crossings were furnished were bound to keep the gates closed when not in use. That, however, does not, in my opinion, create the duty on the part of the defendants, and as between them and any person using the road through the park, of erecting gates and keeping a watchman on that part of the road, which has long since ceased to be a farm crossing.

The duty cast upon the railway company is to erect and maintain "upon the railway" fences, gates, etc.

The liability, if any, on the part of the city does not extend beyond keeping the roadway in repair or free from dangerous pitfalls and obstructions of which they have or may be deemed to have notice. See *Marshall* v. *Industrial Exhibition Association of Toronto* (1901), 1 O.L.R. 319.

In *Graham* v. *Commissioners for Queen Victoria Niagara Falls Park* (1896), 28 O.R. 1, it was held that there is no liability on the part of the Commissioners, to the public using the highways, by reason of the absence or insufficiency of a fence, railing, or barrier on the edge of the cliff, there being no statutory obligation in that behalf imposed on them. That case was decided in favour of the defendants irrespective of their being servants of the Crown. If the road in this park is not a highway, no duty is imposed—certainly none beyond keeping it, as a road, in reasonable repair. If the road is a highway, then, to quote from the case last cited (p. 7): "These cases establish that, in the absence of some statutory provision imposing such a duty on a person or corporation in whom a highway is vested, the duty does not exist, and that where such a duty does exist, in the absence of a provision giving a right of action to persons suffering in consequence of a failure to discharge it, an action will not lie for mere nonfeasance, though it would be

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otherwise if the want of repair was due to misfeasance of the person or corporation upon whom the duty is cast." Further: "If, however, the defendants' liability is based upon the allegation of a duty to maintain the fence or railing for the protection of those resorting to the park, the plaintiff's case also fails, for as to her no charge was made for the privileges which she enjoyed, and she, as it appears to me, occupied as to the defendants at most the position of a bare licensee, as to whom, though there would be a duty in respect of unusual danger known to the defendants and not to her, there would be none as to a bare defect of construction or repair which the defendants were only negligent in not finding out or anticipating the consequences of."

In that case many cases were cited and fully considered, and among those were cases relied upon by counsel for the plaintiff as authority for the maintenance of this action.

In that case one of the learned Judges described the place where the accident happened as "a veritable trap," and the plaintiff was seriously injured.

In the present case there was no unusual danger, and whatever danger there was, was known to the plaintiff as well as to the defendants.

The case of *Stapley* v. *London, Brighton, and South Coast R.W. Co.* (1865), L.R. 1 Ex. 21, was relied upon by the plaintiff. That case is clearly distinguishable. "At the time of the accident, *contrary to the provisions*, by *statute* and by the *defendants' rules*, for the safety of carriage-traffic, the gates on one side of the line were partially open, and there was no gatekeeper." It was held that there was evidence of negligence, inasmuch as by neglecting the required precautions "the defendants might be considered to have intimated that their line might safely be traversed by foot-passengers."

It was argued that even if the defendants were not compelled to establish the gate and employ the watchman, having undertaken it, the plaintiff was entitled to rely upon its continuance, at least until notice, actual or constructive, to the contrary.

Skelton v. *London and North Western R.W. Co.* (1867), L.R. 2 C.P. 631, is against the plaintiff's contention. In that case a

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railway, consisting of several lines, crossed a public footpath on a level, at a point near a station. On each side of the railway was a gate, as required by statute. The railway company, by way of extra precaution, usually, but not invariably, fastened the gates when a train was approaching. S., wishing to cross the railway, found the gate unfastened, and a coal train standing immediately in front of it. He waited until the coal train had moved off, and then, without looking up or down the line, commenced crossing the railway, and was killed by a passing train. If he had looked up the line, he would have seen the train in time to stop and avoid the accident. It was held that S. contributed to the accident by his negligence, and could not recover. And it was also held by Willes, J., "that the mere failure to perform a self-imposed duty is not actionable negligence; that the omission to fasten the gate did not amount to an invitation to S. to come on the line; and that, therefore, even if S. was not guilty of contributory negligence, the company were not liable."

Here the plaintiff found the gate open, but did not see the watchman. That in itself should have suggested to the plaintiff the possibility at least that the gate was open, not as an intimation that there was no danger, but that the watchman had been withdrawn—that there was no watchman in fact. No inquiry was made. The plaintiff thought the watchman was in his cabin—if so, he was not attending to the gate. The plaintiff knew of the railway, that this road led across it, and he knew of the ordinary danger at any railway crossing, and had these all in mind, so there was nothing to relieve the plaintiff of the duty of taking care and using caution when the crossing was reached, unless that care and caution were unnecessary by the fact of the gate being open.

The plaintiff relied upon *Baxter* v. *Jones* (1903), 6 O.L.R. 360, and upon cases cited in Anson on Contracts, 10th ed., p. 98. One case is where a person undertook gratuitously to effect insurance upon another person's house, and, having failed to do so, was held liable. These cases, which are cases of mandate, and nothing of the kind exists here, are said to rest upon this broad ground, as stated by Willes, J., in the *Skelton* case, that if a person undertake to perform a voluntary act, he is liable if he performs it improperly,

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but not if he neglects to perform it. The charge here is that a watchman employed did not do his duty properly. He was not at the gate at all. He was, as to the plaintiff and the public, when this accident happened, the same as during the night time—or during the rest of the year after October—when withdrawn from the gate.

I do not think the defendants are liable for merely leaving the gate open, as there is not, in my opinion, any duty to keep the gate closed at the time of approaching or passing trains. The plaintiff's own account of the accident is as follows: "I was coming through High Park, and when I got to the incline where you go out of the gate I pulled up there, I almost pulled up, I did not stop exactly, just almost stopped, and I gave a look, and there was no train or anything in sight, there was no noise or bell ringing, and I ventured to cross, thinking every other time the watchman came out and either put out his stick or flag, and not seeing him do this, I thought he was in the cabin. I ventured to cross. I thought my track was clear, but the train came along, and when it was as far as from me to Mr. Godfrey, blew its whistle and I was struck. . . ." The distance to Mr. Godfrey was called about ten yards. The horse got over the south track and was not killed. The locomotive struck the rear end of the plaintiff's waggon. "The gates were kept up when the track was clear." "I looked; that is the reason I thought my track was clear." "When I saw the gate up I started to go across." "This was about 4 o'clock in the afternoon."

"I thought the watchman was in his cabin." "It was that cold day . . . on account of the cold day." "I thought he was in the cabin, and I thought my track was clear, and I ventured to cross."

This all goes to shew that the unfortunate plaintiff had the means of knowing, and did, in fact, know, as much as the gate-keeper would have known had he been at the time at his cabin.

Baker (the watchman) had no time-tables. He was not in communication with the railway people, but simply upon hearing or seeing a train approaching he was accustomed to close the gate. Suppose he had been at his post, and had not seen or heard more

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than the plaintiff did—the plaintiff could hardly impute that as negligence. The only means Baker had of knowing when to close the gate was to look and listen. The plaintiff had that same opportunity; he did look—his only complaint is that he did not get the warning or prohibition implied by a closed gate.

The accident is, like others, a very regrettable one, and I would be very glad if the defendants could see their way to assist the plaintiff in some way, but, as I think the plaintiff not entitled in law to recover, I must dismiss the action, and I do so without costs.

CONVEYANCE BY LIFE TENANT.

ONTARIO] [RIDDELL, J.
[IN CHAMBERS.

RE CANADIAN PACIFIC R.W. CO. AND BYRNE.

(15 *O.L.R.* 45.)

Railway—Lands Required for—Infant Remaindermen—Tenant for Life—Order Authorizing Conveyance—Costs—Railway Act, R.S.C. 1906, *ch.* 37, *secs.* 183, 184.

Where a widow was entitled to a life estate in certain lands and her infant children to the remainder in fee, and she had made an agreement with a railway company to sell them such part of the lands as they required for their right of way, at a reasonable price, approved by the official guardian on behalf of the infants, an order was made by a Judge under sec. 184 of the Railway Act, R.S.C. 1906, ch. 37, giving her power to sell the lands and the rights of the infants therein, which power, joined to her legal power as tenant for life, would enable her to sell and convey the fee; the purchase money to be paid into Court, and the company to pay the costs.

Re Dolsen (1889), 13 P.R. 84, followed, the sections of the Act as it now stands being substantially the same as in the Act of 1888.

MOTION by the widow of James Byrne for an order under secs. 183 and 184* of the Railway Act, R.S.C. 1906, ch. 37, allowing her to sell and convey the fee simple in certain land to the railway company. The facts are stated in the judgment.

The motion was heard by RIDDELL, J., in Chambers, on the 25th June, 1907.

* 183. All tenants in tail or for life, *grevés de substitution*, guardians, curators, executors, administrators, trustees and all persons whomsoever, as well for and on behalf of themselves, their heirs and successors, as on behalf of those whom they represent, whether infants, issue unborn, lunatics, idiots, *femes-covert* or other persons, seized, possessed of or interested in any lands, may contract and sell and convey to the company all or any part thereof.

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A. D. Armour, for the applicant and the railway company.
F. W. Harcourt, for the infants.

June 25, 1907. RIDDELL, J.:—James Byrne died in 1897, leaving a will which had the effect of vesting in his widow an estate for life in certain lands, with remainder to his children. The Canadian Pacific Railway Company desiring to purchase a right of way across this land, it was agreed by the widow with the railway company that they should pay the sum of $30 per acre for such land as they required. All the children are infants, but the price has been approved by the official guardian, and seems reasonable.

An application is now made under secs. 183 and 184 of the Railway Act, R.S.C. 1906, ch. 37. The provisions of these sections are precisely the same as those of the Railway Act, 1903, secs. 144 and 145. Section 144 of the Railway Act, 1903, is *totidem verbis* sec. 136 of the Act of 1888, 51 Vict. ch. 29; and sec. 145 is the same as sec. 137 of the Act of 1888 with trifling and unimportant verbal changes.

The case is covered by *Re Dolsen* (1889), 13 P.R. 84, which should be followed.

Under the provisions of sec. 184* of the Railway Act, I give power to the widow to sell and convey to the Canadian Pacific Railway Company the land mentioned and the rights of the infants therein. This power, joined to her legal power as tenant for life, will enable her to sell and convey the fee.

The purchase money will be paid into Court, and the interest therein paid out to the widow for life; after her death the money will be equally divided amongst the children. If for any reason it be desired that the money should not be paid into Court, the matter may be mentioned.

As in *Re Dolsen*, the railway company will pay the costs.

* 184. When such persons have no right in law to sell or convey the rights of property in the said land, they may obtain from a Judge, after due notice to the persons interested, the right to sell the said land.

2. The said Judge shall give such orders as are necessary to secure the investment of the purchase money, in such a manner as he deems necessary, in accordance with the law of the Province, to secure the interests of the owner of the said land.

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HIGHWAY CROSSING—APPORTIONMENT OF COST—PERSON INTERESTED.

CANADA.] [BOARD OF RAILWAY COMMISSIONERS.

GRAND TRUNK RY. CO. v. VILLAGE OF CEDAR DALE ET AL.

CEDAR DALE CROSSING CASE, No. 474.

Highway crossing—"Municipality or person interested"—Jurisdiction of the Board—Protection by gates—Contribution to cost of—Railway Act, R.S.C., 1906, *ch.* 37, *sec.* 59.

The Board by its order of December 19th, 1906, made on the application of the village of Cedar Dale directed that the G.T. Ry. Co. should bear the expense, over and above that to which the Oshawa Electric Company was subject, of protecting by gates the crossing of the G. T. railway by the electric railway on Simcoe street in the village of Cedar Dale at a point about four hundred feet South of the limits of Oshawa. Counsel for the town of Oshawa supported the application for the order stating that the corporation was interested in the protection being granted but should not contribute to the expense.

The G. T. Ry. Co. then applied to the Board to vary its order and apportion the cost of such protection equally between the town of Oshawa, the village of Cedar Dale and the applicant on the ground that the town was interested in the matter and the weak financial position of the village should not exempt it.

Held, 1. That the Board in this case is a court of original jurisdiction and must decide for itself not merely the question of law, but also the question of fact as regards "interest" and also whether, in the exercise of its discretion, the town should contribute to the cost of protecting the crossing.

2. That while as a matter of law there was some evidence of interest on the part of the town, yet as a matter of fact there was no such interest in the circumstances of this particular case and the application should be dismissed, the costs of the village but not of the town to be borne by the G. T. Ry. Co.

Grand Trunk Ry. Co. v. *City of Kingston*, 8 Ex. C.R., 349, 4 Can. Ry. Cas. 102.

In re Canadian Pacific Ry. Co. and *County and Township of York*, 27 O.R. 539, 25 A.R. 65, 1 Can. Ry. Cas. 36, 47 referred to.

THIS application was heard at Oshawa on December 11, 1906.

M. K. Cowan, K.C., appears for the Grand Trunk Ry. Co.

Mr. Rathbun, appears for the Oshawa Electric Ry. Co.

C. A. Jones, appears for the town of Oshawa.

Mr. Coleman, appears for the village of Cedar Dale.

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Simcoe street runs North and South through the town of Oshawa and village of Cedar Dale and is the principal street in both municipalities, connecting them with the Grand Trunk railway station, known as Oshawa. The Oshawa Electric Railway runs down Simcoe street from Oshawa town to the station, crossing the G. T. R. and turning easterly into the station grounds. The line of the G. T. R. crosses Simcoe street at right angles at the point in question requiring protection.

The other facts are stated in the judgment of the Chief Commissioner.

May 23, 1907. THE CHIEF COMMISSIONER:—This was an application by the police village of Cedar Dale for an order directing the Grand Trunk railway company of Canada to provide better protection where its railway crosses Simcoe street in the said village.

There was at the same point an electric railway crossing the Grand Trunk railway, with interlocking appliances operated by the electric company, and the Board, by its order of December 19, 1906, directed that the gates be interlocked with those appliances and be operated by the signal man stationed in the tower, and that the Grand Trunk railway company should bear the expense incident thereto over and above the expense to which the electric company was subject. The Board also directed that an electric light should be provided and maintained by the village at the crossing.

Simcoe street, over which the Grand Trunk railway company crosses, is a continuation of a street of the town of Oshawa, but the point of crossing is outside the limits of the town.* Counsel for the town supported the application for the order, and took part in the examination of witnesses. Among other things he said: "This corporation is interested in having the lives of the citizens protected—their lives and property—and would urge upon the Board as strongly as possible the propriety of providing such protection as may be thought proper." And after

*About 400 feet.—Rep.

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reference to the probable expense of a subway, he said: "But all the other protection that could be afforded would be urged by this corporation." Further he said: "The town council do not see that they should be called upon to contribute. They contribute an immense amount of business to the railway."

In announcing to the parties its conclusions, the Board expressed doubt whether the town could be considered interested so as to be liable to be made a contributory to the cost of protection of the crossing, and intimated that, if the railway company should be of opinion that the town was so liable, the Board would like to be furnished with references to any statutory provisions imposing on the town or bestowing on it any rights with respect to a highway outside the boundaries of the town; and it also stated that it considered that the village of Cedar Dale was not in such financial position that it should be asked to contribute, except by providing and maintaining a light at the crossing.

The Grand Trunk railway company then applied to have the order varied so as to apportion the cost of the installation, operation and maintenance of the gates equally among the town of Oshawa, the village of Cedar Dale and the railway company, claiming that the town was interested in the matter and should be compelled to contribute, and that the weak financial position of the village was no sufficient ground for exempting it.

This latter application was heard before the Board. In support of the claim of interest on the part of the town, reference was made to the position taken by the counsel for the town at the previous hearing, and to the case of the *Grand Trunk Ry. Co.* v. *City of Kingston*, 8 Ex. C.R. 349; 4 Can. Ry. Cas. 102. In that case an application was made to have certain orders of the Railway Committee of the Privy Council made rules of the Exchequer Court. By these orders, the city of Kingston was directed to contribute to the expense incident to the construction of a subway for carrying a highway under the Grand Trunk railway outside of the city limits, and objection was made to

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the authority of the Railway Committee to impose this condition. The learned judge of the Exchequer Court was of opinion that he had no authority to review the decision of the Railway Committee upon the merits, or its method of procedure. He said: "Was the city of Kingston interested in the works that were directed to be done? If that question is answered in the affirmative, the Railway Committee had jurisdiction to make the orders as amended. If it is answered in the negative, then the Committee had no jurisdiction to impose upon the city of Kingston the obligation to bear any part of the cost of such works. I think the question should be answered in the affirmative. Although the works directed to be carried out are not within the limits of the city of Kingston, they are in close proximiity thereto, and are intended to protect the public from danger of crossing the Grand Trunk railway by a level crossing on a road that, within a short distance from the crossing, connects with one of the city streets. In addition to this, it appears that the city of Kingston was one of the movers in the application to the Railway Committee for an order to have the works in question undertaken, and it seems to me that one could not now, with fairness, say that the city of Kingston was not interested therein."

In re Canadian Pacific Railway Company v. *County and Township of York*, 27 O.R. 559; 25 A.R. 65; 1 Can. Ry. Cas. 36, 47. Mr. Justice Rose upheld the validity of an order of the Railway Committee under which the city of Toronto, the county of York, and the township of York were directed to contribute to the cost of installing and maintaining gates and a watchman for the protection of a highway crossing which was in the township of York and outside the limits of the city of Toronto. The order of the Railway Committee had been made upon the application of the city of Toronto. The county and township of York appealed from the judgment. Burton, C.J.O., and Maclennan, J., were of opinion that the order was invalid in so far as it imposed a burden upon the township and county. Osler, J.,

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held that the township and county were "persons interested" within the meaning of the Railway Act, and subject to the jurisdiction of the Committee. Meredith, J., held that, as the road was not a county road, and the county was under no responsibility for its maintenance, it could not be considered to be interested so as to be liable to the order of the Committee.

The city of Toronto did not appeal, and it does not appear to have been represented before the Court of Appeal. As the original applicant for the order, it could hardly be said that it was not interested.

In the two cases referred to, the courts were called upon to enforce orders made by the Railway Committee. They could not review the decisions of the Committee upon the facts. If there was before the Committee any evidence that the parties ordered to contribute were "interested" within the meaning of the statute, the jurisdiction of the Committee to make the orders could not be disputed.

In the present case this Board is the court of original jurisdiction which has to decide for itself, not merely the question of law, but also the question of fact, as regards interest, and further, whether, in the exercise of its discretion, it considers that the town should justly and properly be made to contribute to the cost of protecting the crossing in question.

I think that it cannot properly be said that, as a matter of law, there is not some evidence of interest on the part of the town which would support an order of the Board against it, particularly in view of the direct claim of interest on the part of counsel representing the town. But it does not appear to me that the town is necessarily bound by the admission of some interest, having in view the circumstances and the nature of the interest admitted. The town corporation is a statutory body. It has no duty to maintain highways outside of the town limits, or preserve them from obstruction. It is not authorized to expend the moneys of the town upon such highways. As a public body, having in view the interests of the citizens, a town council

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often interests itself in many matters of public importance not directly coming within its functions. Naturally the safety of citizens of the town travelling along the highway and over the crossing in question is looked upon by the council as of public interest; but it does not appear to me that, on that account, the municipal corporation can be said to have any legal interest in the matter of protecting the crossing. The individual interests of citizens having occasion to use the highway are not, in my opinion, ascribable to the corporation, and the admission of the counsel for the town, and the part which he took in supporting the application, do not appear to me to carry the matter farther or to constitute such an admission or evidence of interest as to warrant the Board in finding as a matter of fact that there was such interest.

I think, therefore, that the town should not be ordered to contribute to the expense of erecting, maintaining, or operating the gates.

As regards the village of Cedar Dale, the matter stands in no different position from that presented at the original hearing. I do not think that the Board should be called upon in such a case to revise its previous decision, where no new facts have been presented and no material point was previously overlooked. In making the order the Board expressed its doubt upon the question of making the town a contributory. That question was fairly open for reconsideration.

In my opinion the application should be dismissed, and the railway company should be ordered to pay to the village a reasonable sum for costs of the application to vary the order. In view, however, of the state of the previous decisions and of the position taken upon the hearing by the town, I do not think that the railway company should be made to bear any portion of the costs of the town.

Order dated May 23, 1907, issued accordingly. Costs of the application fixed at the sum of $25.

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HIGHWAY CROSSING—COST OF MAKING.

VILLAGE OF WESTON v. CANADIAN PACIFIC AND GRAND TRUNK RY. COS.

DENISON AVENUE CROSSING CASE, No. 593.

Construction of highway across railway—Municipality to bear cost of construction and maintenance—Sec. 237, Railway Act, ch. 37, R.S.C., 1906.

At the end of a village street a private level crossing over two lines of railway was allowed to be used for many years by the public for access to a stove foundry across the tracks without any active steps being taken by the railway companies owning them to prevent this practice. The land on the village side had been subdivided into lots and built upon across the tracks. This street had been laid out in continuation through farm lands to a public highway.

The railway companies put up warning notices and occasionally closed the gates at each side of their lines thereby preventing any inference of any intention to dedicate this portion of their lines to public use as a highway crossing.

Upon application by such adjoining village municipality for an order directing the railway companies to construct a public highway across their lines at the place in question.

Held, 1. That the applicant should be granted leave at its own expense to construct and maintain a highway across the railways and the lands of both companies.

2. The multiplication of level crossings is entirely undesirable, but not so undesirable as illegal level crossings and railway companies should either fence off their lines and take steps to prevent the unlawful crossing of their tracks or allow public highways to be placed across them where the public interest demands such a course.

The municipality of the village of Weston applied under section 237 of the Railway Act, for an order directing the Canadian Pacific Railway Company and the Grand Trunk Railway Company of Canada to construct a public crossing at the east end of Denison Avenue.

The application was heard at Toronto on November 6, 1907.

The facts are as above stated.

W. E. Raney, appears for the municipality of Weston.

M. K. Cowan, K.C., appears for the Grand Trunk Ry. Co.

Angus MacMurchy, appears for the Canadian Pacific Ry. Co.

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W. E. Raney, while admitting that there was no legal right of crossing, contended that by reason of user for a number of years, and in the public interest the application should be granted.

The railway companies, although the crossing was fenced and gates placed on each side of the tracks, had, by allowing these gates to remain open and by planking the spaces outside and between the tracks, tacitly allowed a crossing.

Cowan, K.C., and *Angus MacMurchy,* for the railway companies. The proposed crossing is dangerous on account of the traffic and will become more so. It would be better to divert the highway for vehicular traffic, and allow a foot bridge to be constructed. The railway companies have never submitted to the public user of this crossing, which constitutes a trespass.

There is a sign at the proposed crossing reading "No thoroughfare; private crossing."

The gates at the proposed crossing have been continually shut by the section men, and as often re-opened by the public.

December 30, 1907.

THE CHIEF COMMISSIONER:—While the railway companies put up warning notices and occasionally closed the gates on each side of their lines, thereby preventing any inference of intention to dedicate these portions of their lines to public use as a highway crossing, they took no effective steps to put a stop to their actual use by the public for this purpose, and the public have used the same for many years. Such a course of proceeding is highly objectionable. In tacitly conniving at these trespass crossings, while endeavouring to protect themselves from liability in respect to the same, they are maintaining a public danger, and ought not to expect the same consideration for their interests as in cases where it is sought to construct entirely new highway crossings over their railways, the multiplication of level highway crossings is entirely undesirable, but not so

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undesirable as the illegal level crossing, and railway companies should either fence off their lines and take steps to prevent the unlawful crossing of their tracks or allow public highways to be placed across them where the public interest demands such a course. It appears to me that the public interest would not be satisfied by allowing a crossing for foot passengers only, and that the village should be allowed to open the highway across the railways.

The following order was made by the Board:—

"1. That the applicant be, and it is hereby granted leave at its own expense, to construct a highway in the line and the width of Denison Avenue, in the said village of Weston, across the railways and lands of the railway companies, as shewn on the plan and profile on file with the Board under the said case, No. 2361, file No. 4394.

"2. That the applicant, at its own cost and expense, do all the grading required for the approaches to the said crossing and thereafter maintain the same; and that the railway companies, respectively, at the sole cost and expense of the applicant, provide all the material, including crossing planks, suitable and proper cattle guards, crossing signboards, and turned in fences from the fences of the said companies along their respective railways, and do all the work necessary to make the said crossing of their respective railways, conform and comply fully in all respects, at all times, with the provisions of the Railway Act, respecting highway crossings of railways; and thereafter, at the sole cost and expense of the applicant, maintain the same as required by law.

"3. That the applicant from time to time, on receipt from the railway companies, respectively, of duly certified accounts for work done, material supplied, and services rendered by the railway companies under the provisions of this order, pay the amount of such accounts on demand to the railway companies.

"4. That all questions as to the protection of the said crossing be, and the same are hereby, reserved for further consideration."

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The following are the judgments of Mr. Commissioner Mills omitted from the report in *High River et al.* v. *Canadian Pacific Ry. Co.*, 6 Can. Ry. Cas. 344.

November 10, 1906.

MR. COMMISSIONER MILLS, in concurrence:—I cannot help feeling that when a company, running a line of railway through a locality, fixes upon a place for its station and lays out a townsite on both sides of its tracks, providing for streets running through the town (across its railway), and prohibiting the people, who may settle in the town and use the said streets, from crossing the said railway within the limits of the railway yard, varying in length from one-third to one-half a mile or more, it (the said company) thereby creates an unreasonable and intolerable business condition, such as no class of people, whether living in the town or going there to do business, should be asked to submit to.

The unreasonableness of the prohibition above referred to is shewn by the fact that in nearly every such instance the local railway officials allow people on foot to pass illegally across the railway tracks within the prohibited limits, as the members of the Railway Commission, their officials, and many others did on the day of the recent visit of the Commission to the town of High River, and in not a few such places, vehicular traffic is allowed to pass illegally across the right of way and over the tracks within the prohibited limits, because the prohibition is felt and tacitly acknowledged by the railway officials themselves to be unfair, if not altogether indefensible.

For this intolerable business condition, the railway company is primarily responsible, and the people who, with knowledge of the facts, settle in a town where such a condition exists, are, perhaps, to some extent also responsible, in so far as they thereby tacitly agree or consent to work and live where such condition is imposed.

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Therefore, I am of opinion that, in such cases, some measure of relief should be granted, and that the railway company should bear, say, one-half of the expense of providing such relief.

All rail-level crossings involve more or less danger, farm crossings, highway crossings, street crossings over single tracks in cities, towns and villages, and street crossings over two or more tracks within the limits of railway yards, some close to stations and others at greater or less distance therefrom. Nevertheless, large numbers of each of these kinds of crossings are found all over the country, because public opinion (the law-making power) long ago decided, and still maintains, that such crossings are absolutely necessary. I admit that rail-level crossings through a railway yard are specially objectionable and should be avoided as far as possible, but on account of the intolerable condition above described, the need for such crossings has been so great that, notwithstanding the danger, they have been made in nearly every town or village (not to speak of cities) through which a railway passes in the older provinces, and it appears to me that the Board of Railway Commissioners, especially on account of the increased and ever increasing length of railway yards, is now, and will hereafter be, under obligation to grant such crossings in response to reasonable applications and appeals by the business people of the country, until such time as there is special legislative provision for distributing and in some way defraying the expense of subways, overhead bridges or other special forms of protection at many, if not most, of the crossings in our cities, towns and villages.

Further, rail-level crossings, especially crossings through a railway yard, cause a certain amount, possibly a considerable amount of inconvenience to a railway company. This is admitted. Nevertheless, I think it is manifest that such crossings must continue to be made until, as above suggested, there is special legislative provision for the construction of subways or overhead bridges at crossings which cannot be properly pro-

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tected by the ordinary and less expensive methods. At present the question is who shall bear the inconvenience, the public or the railway companies? My opinion is, first, that the inconvenience should be equitably divided; and, second, that no class of people in any city, town or village, should, in the transaction of business or the discharge of social or civil duties and obligations, be compelled to walk or drive unreasonably long distances in order to cross the right of way and track or tracks of any railway company.

In speaking of the Calgary and Edmonton Railway, I may say that I do not question the correctness of the statement that "the towns and villages along the line of the Calgary and Edmonton Railway owe their existence to that railway;" but, I might ask if it is not equally true that the Calgary and Edmonton Railway owes its existence and its manifestely profitable traffic to the said towns and villages and the trade of the farmers who use the streets thereof.

I admit, also, that the Board should "consider the relative convenience of the public and the railway company, as well as the public safety," and should not forget that "the efficient operation of the railway is a matter of importance to the public generally, as well as to the residents of particular localities dependent upon it;" but the experience of railway companies and of the public generally in the older provinces of the Dominion goes, I think, to shew that the interests of neither the one nor the other have been seriously sacrificed by granting the residents of particular localities reasonable facilities for doing business on the opposite sides of the lines of railway which pass through the cities, towns or villages in which they live.

I do not attach much importance to the insistence of those who seek relief; but I desire to give due weight to the facts in each case, and I never can bring myself to think that the Board, on any mere theory of inconvenience to the railway company or from a desire to meet the wishes of the general public for more rapid transportation, is justified in allowing a railway company

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to create and maintain unreasonable or intolerable business conditions in any city, town or village through which it passes; and while I do not desire to minimize the danger of crossings through railway yards or elsewhere, I would venture the statement that most of the accidents on the railways in this country are due, not to crossings, but to collisions of various kinds on the railways, and to carelessness or recklessness in shunting, which results in the death of so many railway employees.

Therefore, my opinion is that the municipality of High River should be authorized to cross the right of way and track or tracks of the Calgary and Edmonton Railway Company on Third Street in the said town as soon as it obtains and transfers in fee simple to the said company, the plot of land agreed upon between the company and the municipality, all as per agreement between the parties, and that Seventh Street, in the said town, should be kept open and maintained as heretofore for the use of the public in that locality.

February 1, 1907, judgment in dissent, MR. COMMISSIONER MILLS.

Findings:—That the Calgary and Edmonton Railway Company graded and planked the railway crossing on Hespeler Street, Didsbury, Alta, opened the said crossing, and maintained it during a continuous period of about four years, for hauling freight to and fro between the village on the West side of the railway and the freight tracks or sidings on the East side of the main line, and for general use by all who cared to travel to and from the East side of the railway, whether the residents of the village on the West side, the property holders on the East side, or the farmers and others in the country lying East, North-East, and South-East of the village.

That during the time that the crossing on the said street was in use, and without any kind of notice or intimation that it would ever be disallowed or closed, some seventy lots of land were bought on the East side of the railway, in what is now

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called Lacknerville, or Didsbury East. These lots, it appears, were bought and some houses were built in good faith and under the undoubted impression that on Hespeler Street there would continue to be, as there had been, a regular public crossing over the railway, open at all times for the use and convenience of those who might wish to pass to and fro between their property on the East side and their place of business in the village on the West side of the railway.

That the owners of the said lots, with or without houses, have vested rights which they acquired on the faith that the railway company would continue to do as it had done regarding the said Hespeler Street crossing, which crossing the company had itself established, maintained and allowed the public to use without let or hindrance for a period of four years or longer.

Expressions of opinion:—No doubt the railway crossing on Hespeler Street did, when in use, and will, if restored, involve two things:—

1. Some danger to the travelling public in that locality.
2. Some inconvenience to the railway company.

All rail-level crossings involve more or less danger, farm crossings, highway crossings, street crossings over single tracks in cities, towns and villages, and street crossings over two or more tracks within the limits of railway yards, some close to stations and others at greater or less distance therefrom. Nevertheless, large numbers of each of these kind of crossings are found all over the country, because they are regarded as absolutely necessary, and they must, in my opinion, continue to be made, with or without protection and notwithstanding the danger, until such time as special legislative provision is made for defraying the cost of subways or bridges at crossings which involve serious risk. This, I take it, is the reason why the Railway Committee of the Privy Council allowed and legalized hundreds of more or less dangerous rail-level crossings on streets and through railway yards in the cities, towns and villages of the Dominion.

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Further, every rail-level crossing, especially a crossing through a railway yard, causes a certain amount, possibly a considerable amount, of inconvenience to the railway company; and, after carefully considering the whole situation and circumstances, I am of the opinion that this inconvenience, like the danger above referred to, must continue until legislative provision is made for subways or overhead bridges at such crossings as cannot be satisfactorily protected by the usual means now in use. At present, the question is, who shall bear the inconvenience, the public or the railway companies? My opinion is that the inconvenience should be equitably divided: on the one hand, the railway companies should not be embarrassed by too many crossings through their yards, municipalities should not, in some instances, be given all the crossings they ask for, and, on the other hand, no class of people in any city, town or village should, in the transaction of business or the discharge of civil and social duties or obligations, be compelled to walk or drive unreasonably long distances in order to get across the right of way and tracks of a railway company.

In my opinion, the aim of the Commission should be, not to restrict, hamper or embarrass the business community by refusing or closing such railway crossings as reasonable convenience demands, but to provide protection at dangerous crossings and endeavour to distribute as equitably as possible the cost of such protection.

The distribution of the cost of protecting a railway crossing must always depend upon the facts and circumstances: Who created the necessity for the crossing? Who is responsible for the facts and circumstances? Who have made the demand for the crossing a reasonable one? Who is or are served by the crossing—the railway company alone, the municipality alone, or both, or the railway, the municipality and the outside, surrounding public? What has caused the danger that makes the protection necessary—increased traffic on the railway, the running of fast through trains, or the growth of population and industries in the municipality?

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I stated my views *re* the distribution of the cost of protecting certain crossings in the village of Didsbury, but out of deference to the opinion of the Chief Commissioner, I decided to leave that question for future consideration—to be settled when the occasion arises—and shall deal only with the application for the re-opening of the crossing on Hespeler Street in the said village.

In reference to this application, I may say that, for reasons which were obvious though not openly avowed at the hearing, the railway company did not, in the case of Didsbury, lay out and sell any portion of its land on the East side of its line of railway, and did not thus contribute to any inconvenience which might result from a lack of crossing over its railway in the village, but, as already stated, it laid out the village on the West side of its line, placed its freight shed and freight sidings on the East side of its line, and established a regular crossing over its tracks on Hespeler Street in the said village. For a period of four years or longer, the said Hespeler Street crossing was used, not only for the business of the company, but for all kinds of traffic—village and farm traffic alike—without let or hindrance from the company, or any kind of intimation that the said crossing would ever be closed, and the evidence shews that, under the impression that on Hespeler Street there would continue to be, as there had been, a regular public crossing, a number of people bought lots on the East side of the line, some of them built houses there, and others spent a considerable sum of money on Hespeler Street, East of the line, in order to improve the road leading up to the crossing on said street. Then, after a number of people had acquired rights on the East side of the railway, the railway company, without notice, closed the crossing on Hespeler Street and opened another which it thought would better serve its purpose. This course of action by the company does not seem to me to be quite fair or reasonable; it might, perhaps, be described as arbitrary, and if the Railway Commission should approve of it as a fair and reasonable proceeding, it would, I

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think, thereby take a serious step towards establishing a new principle of law in dealing with the question of vested rights.

Therefore, my judgment is:—

That the said Hespeler Street crossing over the right of way and tracks of the Calgary and Edmonton Railway, in the village of Didsbury, in the Province of Alberta, should be re-opened and maintained as a regular public crossing over the said railway at that point; the grading on each side of the track or tracks to be maintained in good order by the village, and the planking, not less than twenty feet long, between and on the outside of each pair of rails, to be laid and kept in good condition by the railway company.

NOTE.

In the High River Case, 6 Can. Ry. Cas. 344, p. 351, it was held that "The Board is not authorized to direct or compel railway companies to construct or make highways across their lands where a public right of crossing does not already exist by law though it may give leave to a company (*sic*) or to some other bodies on some terms, to do so." In that case the question of giving leave to a municipality to construct a highway across railway lands where no public right of crossing existed at that time was not formally decided as an amicable arrangement was made between the parties.

In the present case, the Board authorized the village of Weston, a body having power to construct highways, to extend Denison avenue across the railways. The railway companies were not obliged to extend this highway or pay for the work, the municipality being ordered to pay the costs of construction and maintenance of the crossing, it being admitted that no public right of crossing existed by law. See *Grand Trunk Ry. Co.* v. *City of Toronto*, 1 Can. Ry. Cas. 82, and *Re Reid and Canada Atlantic Ry. Co.*, 4 Can. Ry. Cas. 272.

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EXPROPRIATION—CONTRACTUAL RELATIONSHIP.

CANADA.] [BOARD OF RAILWAY COMMISSIONERS.

ECKARDT v. GRAND TRUNK RY. CO.

BURNT DISTRICT CASE (2), No. 595.

Railway company—Taking additional land—Arbitration—Compensation—Terms and conditions—Interest—Powers of Board—Secs.* 29, 192, *Railway Act, ch.* 37, *R.S.C.* 1906—*Secs.* 139, 153, *Railway Act*, 1903—*Varying order of the Board—Contractual relationship.

The Board on February 23rd, 1905, made an order authorizing the Grand Trunk Railway Co. to take certain lands in the City of Toronto for a railway passenger station, etc., upon certain terms and conditions: (Burnt District Case, 4 Can. Ry. Cas. 290).

One of the terms and conditions (numbered 7), was that the applicant should pay to the owner, if thereto required by notice in writing given to it before the appointment of arbitrators, compensation with interest at 5 per cent. per annum from May 4th, 1904. Arbitrators were appointed on January 23rd, 1906.

On February 4th, 1907, Eckardt applied to the Board for an order to vary clause 7, so as to dispense with or extend the time for giving the said notice or allowing it to be given *nunc pro tunc* or for such further and other order as to the Board might seem proper.

***Held*,** that the application should be dismissed; the railway company had acquired a vested right to obtain the land upon the statutory terms and the matter had passed out of the hands of the Board.

Mr. Watson, K.C., appears on behalf of the applicant.

Mr. Nesbitt, K.C., appears on behalf of the Grand Trunk Railway Company.

Watson, K.C., based his argument on sections 23, 25, 39, 40, and 41 of the Railway Act, 1903, and rules 18 and 19 of the Board, particularly section 39 and rule 18, contending that the Board had the powers of a Superior Court and could vary the order as desired by the applicant. This is not a case of independent contract. The relation of vendor and purchaser is not applicable to it. The Board has inherent and statutory power to exercise its discretion to extend time or give other relief.

Nesbitt, K.C., contended that under section 153, Railway Act 1903, (present section 192) the Board had no power to

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make the order against the will of the company. It was open to the company to accept or refuse the terms of the order of expropriation. The notice served on Eckardt constituted the relation of vendor and purchaser between the parties. *Haynes* v. *Haynes*, 1 Dr. & Sm. 426 at p. 450. This is the case of a consent order, the terms of which cannot now be changed. *Attorney-General* v. *Tomline*, 7 Ch.D. 388; *Huddersfield* v. *Lister & Son* (1895), 2 Ch. 273; *Wilding* v. *Sanderson* (1897), 2 Ch. 534; *Stewart* v. *Kennedy*, 15 App. Cas. 108. Section 39 of the Act (present section 50) has no bearing upon such a case as this.

June 15, 1907. THE CHIEF COMMISSIONER:—On the 23rd February, 1905, the Board made an order under section 139 of the Railway Act, 1903, authorizing the Grand Trunk Railway Company, upon certain specific terms and conditions, to take certain lands in the City of Toronto for the purpose of a railway passenger station and station yards and such purposes as are necessarily or usually connected therewith. Among the terms and conditions imposed by the order were provisions that the construction of the station and appurtenances should be commenced within one year and completed within three years from the date of the order, or within such further period as might be sanctioned by the Board: that the station building and appurtenances should be located and constructed in accordance with plans to be agreed upon by the railway companies interested and approved by the Board: that the company should, within three months from the date of the order, proceed to remove the debris resulting from the fire on the land within the area covered by the application, and push to completion as soon as possible the work of removing all rubbish and waste materials from such area, with a provision that, in case the company should be unable to obtain possession of the land for the purposes, this time might be extended by the Board as to any part of said lands: that, unless the company should notify the Board of its acceptance of the order on or before a certain date, the application should be dismissed: that the company in accept-

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ing the order, should be understood and deemed to have agreed that the land should be acquired and the work should be undertaken and prosecuted to completion without undue or unnecessary delay and in accordance with, and subject to, the terms of the order and direction of the Board. The order contained the further provision: "7. That the applicant company shall, if thereto required, by notice in writing given to it by or on behalf of any owner of or party interested in any of the said lands at any time before the appointment of an arbitrator or the last of the arbitrators to be appointed under the Railway Act, 1903, to ascertain the amount of the compensation to be paid for any such land or interest therein, pay to such owner or party interested, compensation to be ascertained, fixed, and awarded with reference to and as of the date of the first receipt by such owner or party interested, or the predecessor in title or interest of such owner or party, of notice of intention to take the land of such owner, or in which such party is interested, or of the proposed application to the Board for authority to take the same, together with interest thereon at the rate of 5 per cent. per annum from that date until payment; and the applicant company shall allow the arbitrator or arbitrators who may be appointed to ascertain such compensation, to ascertain, fix and award the same with reference to and as of the date aforesaid, instead of with reference to the date otherwise provided by the Railway Act, 1903: provided that in the case of any owner or party interested in any of such lands, who has been in receipt of rent for, or in the beneficial occupation and use of, any part of such land at any time since the receipt of such first notice as aforesaid, compensation shall be ascertained and paid for such part only with reference to the date fixed for the purpose by said Act and to the amount by said Act required."

On the 21st September, 1905, the company gave notice to A. J. H. Eckardt that it required for the purposes of its railway all his estate and interest in certain described lands, being a portion of the lands which the company were authorized to take

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under the order just mentioned, and offered a certain sum by way of compensation. This sum not being accepted, on the 23rd January, 1906, an order was made by a Judge of the High Court of Justice for Ontario appointing arbitrators to determine such compensation.

On the 4th February, 1907, Eckardt applied to the Board for an order to vary clause seven of the Board's order, so as to dispense with the giving of the notice in writing referred to in paragraph seven, or for an order extending the time for giving the notice, or allowing the notice to be given *nunc pro tunc*, or for such further and other order as to the Board might seem proper, and so as to enable the applicant to have it provided that the arbitrators were to ascertain the amount of the compensation to be paid to the applicant as of the date of the first receipt by him of the notice of intention to take his land. This application was supported by affidavits shewing that the applicant had urged before the Board that the date as of which the compensation was to be fixed should be varied from that specified in the Railway Act: that the judgment of the members of the Board has provided that this should be done: that a draft of the order so providing had been submitted to the applicant, and that the change in the form of the order, by which a notice from the property owner should be necessary in order to so vary such time, had been made without knowledge of the applicant's solicitors, and had remained unnoticed by them until after the appointment of the arbitrator.

By section 192 of the Railway Act (section 153 of the Act, 1903), the date of the deposit in the registry office, of a plan, profile, and book of reference shewing the lands to be taken, is the date with reference to which compensation or damages are to be ascertained. In view of existing circumstances, the Board thought it would be more equitable to grant the request of certain parties interested in the land sought to be taken under the order that a change should be made in this date, and the original draft of the order did directly and unconditionally so pro-

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vide: but, on perusing this draft, it appeared to me that an order in such terms might be successfully appealed against by property owners on the grounds that the Board had no power to thus change the time fixed by statute. The Railway Act enables the Board to impose terms upon a railway company seeking to take, without the consent of the owners, a greater quantity of land than the Act directly allows: and the order was changed so as to impose a condition in this respect upon the railway company, while leaving the property owners the option to require a change in the date as of which the compensation should be fixed. The method provided by the order for the exercise of this option was the giving of a notice in writing to the railway company at any time before the appointment of an arbitrator, or the last of the arbitrators, to ascertain the compensation for the land. When the arbitrators were appointed without any such notice having been given by the present applicant, the railway company, it appears to me, acquired a vested right to obtain the land upon the statutory terms.

It is claimed by the applicant that, under section 29 of the Railway Act, the Board has absolute power to rescind or vary the order authorizing the company to take the land, and that the company has itself failed to comply with some of the terms of the order and cannot therefore be said to have an absolute right to the continuance of the order in its present form.

Section 29 does, by its terms, authorize the Board to rescind, change, alter, or vary any of its orders. I think that the Board has the power, under this clause, to make the change asked for. It does not appear to me that the case is one of a consent order, as urged by counsel for the railway company. The making of the order was contested strongly, and by none more strongly than by the present applicant. It is true that some attempt was made to meet the wishes of the applicant in regard to the date with respect to which the compensation was to be fixed, and that the railway company was obliged to accept this as one of the terms of the order: but the parties were at arms' length;

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the order was made against the will of the present applicant, and the term in question was one imposed upon the railway company by the power of the Board, though necessarily accepted by the company. It is true that the construction of the railway station has not yet been begun, and that the plans therefor have not yet been submitted to or approved by the Board: and that the Board has made no definite order extending the time for these purposes. But we know that there were appeals against the Board's order, and that complications have caused delay. The Board has forborne to press for the more speedy fulfilment of the terms of the order on account, particularly, of the negotiations between the City of Toronto and the railway companies with reference to the station plans and other matters connected therewith. But none of the terms as to the time within which acts were to be done by the company for the purpose of fulfilling the objects for which the right to take the land was granted were conditions precedent to the right to take the applicant's land: they were conditions imposed in the public interest and not in the interest of the land owners: and it does not appear to me that the present applicant should be allowed to take advantage of any default of the company in these respects for the purpose of imposing upon the company a liability different from that to which the company is subject under the circumstances which have occurred in respect of the applicant's land. The company accepted the order according to its terms, under which the company was not bound to give compensation otherwise than was required by the statute, unless the applicant gave a certain notice before the happening of a particular event. The notice not having been given before the happening of this event, it does not appear to me that the Board can properly place the company in a different position from that in which the circumstances have already placed it. Cases in which the Court has extended time for appealing, or for taking other steps in the conduct of proceedings in the Courts, do not appear to apply to a case like the

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present. Here, so far as the acquisition of these lands is concerned, the matter has passed out of the hands of the Board, and the parties should be left, I think, to the exercise of their legal rights.

In my opinion the application should be dismissed.

LOCATION—DEVIATION.

CANADA.] [BOARD OF RAILWAY COMMISSIONERS.

ROBERTSON v. CHATHAM, WALLACEBURG & LAKE ERIE RY. CO.

(*Case No.* 722.)

Electric railway—Construction along highway with consent of municipality—By-laws—Location of the line and change thereof—Filing of further plans and profiles dispensed with by the Board—Order of the Board authorizing deviation—Date of filing new plan subsequent to date of Board's order—Damage—Compensation—Road-side land owner—Secs. 20, 235, *Railway Act, R.S.C. ch.* 37, 1906—*Sec.* 186, *Railway Act*, 1903.

On an application by a land-owner for an order rescinding an order of the Board allowing an electric railway company to change the location of its line from the centre to the west side of a public highway on the ground that such deviation would injuriously affect his property.

Held, 1. Refusing the application, that the Board having already sufficient material before it, could authorize such deviation without the filing of further plans and profiles.

2. That the railway in question was one "to be operated as a street railway or tramway" within the meaning of sec. 235 of the Railway Act and that the Board must either authorize the placing of the railway upon the street in accordance with the terms of the consent of the municipality, (that it should be on the west side of the highway) or refuse the authority entirely.

Chief Commissioner:—The construction of the railway would more than offset the damage to the owner's land.

Deputy Chief Commissioner dissenting.

The question of compensation should be decided by the ordinary courts of justice and rests entirely between the immediate land owner and the municipality.

Commissioner Mills dissenting.

The order should stand only on condition that the land owner is allowed reasonable compensation.

This application was heard at Chatham October 29, 1907.

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J. T. Small, for the land owner, Robertson.

J. G. Kerr, for the Chatham, Wallaceburg & Lake Erie Ry. Company.

O. L. Lewis, for the city of Chatham.

The facts are fully stated in the judgment of the Chief Commissioner.

J. T. Small. Under section 130 of the Railway Act, 1903, the location is fixed until altered by the Board, and by section 131 the work shall not be commenced until this is done. When the agreement was made with the company on June 24, 1905, the location was on the centre of the street, and sanctioned by the Board under section 123. If there is power to change the location this can only be done by another by-law. The former by-law was spent and on the merits of the location should not be changed.

J. G. Kerr. The Board's order of December, 1905, confirmed the by-law and authorized the company to go where the city engineer and the chairman of the industrial committee directed. The municipality and not the Board locates the line on the highway. If the company cannot get the consent of the municipality the Board cannot locate the line on the highway. The municipality is exercising its judgment in good faith and the order should not be rescinded.

O. L. Lewis. No particular location was ever approved in writing by the chairman of the industrial committee and the city engineer together. The by-law is referred to in the order of the Board and is therefore sanctioned.

November 26, 1907. THE CHIEF COMMISSIONER:—This is an application by Arthur K. S. M. Robertson for the rescission of an order of the Board granting leave to the Chatham, Wallaceburg & Lake Erie Railway Company to carry its line of railway upon and along certain streets in the city of Chatham.

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The applicant's objection relates only to the portion of the railway to be carried along Queen street and to its location on the street opposite property of the applicant.

Under the order the railway is authorized to be located on the side of the street next the applicant's property, the centre line of the track to be nine feet and four inches from the centre line of the street. The applicant desires that it be located in the centre of the street and claims that the approved location is very injurious to his property.

By order made on the 11th August, 1905, the plan, profile and book of reference of the location of the railway in the city of Chatham were approved by the Board, subject to the terms and conditions set forth in by-law No. 815 of the city of Chatham. This plan shewed the railway to be apparently located along the centre of Queen street. The by-law referred to was one authorizing the city to lend to the railway company a certain sum of money. It provided, among other things, as follows:—"Before work is commenced on any section or portion of the company's railway in the said city of Chatham, the plans setting forth the proposed location of the company's tracks shall be submitted to the engineer of the said city for approval, and the same shall not be altered thereafter without the consent of the said engineer; and the tracks of the said company shall not be laid or work done by the company upon any of the streets of the said city until the engineer of the said city has approved of the location of the same."

By by-law No. 946 of the city, passed on the 29th May, 1905, the company was authorized, "subject to the terms of an agreement to be entered into between the corporation of the city of Chatham and the Chatham, Wallaceburg & Lake Erie Railway Company, to lay down and construct a street railway upon the following streets or portions of streets." Among these was Queen street, from William street to the southern limit of the city. The company was also authorized, "subject to the terms of the agreement to be entered into as aforesaid," to run pas-

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senger cars "over the tracks of the said street railway" on certain streets, among which was Queen street, and also to run passenger and freight cars as aforesaid over certain streets, among which was Queen street. By the by-law it was provided: "9. The location of the line of railway in any of the streets aforesaid shall not be made until plans thereof shewing the position of the rails, poles and wires, and other works in each street shall have been submitted and, in writing, approved of by the city engineer and chairman of the industrial committee or such other committee as the council for the time shall appoint for this purpose."

By by-law No. 1013 of the city, passed on the 27th June, 1905, reciting the previous by-laws and that it was "desirable to define the terms of the agreement to be entered into as aforesaid under the said by-law No. 946," many provisions were made respecting the company's railway, modes of operation thereof, etc., among which were the following:—

"25. The location of the line of the said railway on the said streets, and the position of the rails, switches, turn-outs, and other works thereof shall be shewn upon plans, with figured dimensions shewing the distance of all their works from the side lines of the streets, which shall be submitted to the said engineer and chairman of the industrial committee, or of such other committee as the council for the time being shall appoint for this purpose, and none of the said works shall be commenced until the said plans have been submitted to and approved of as required by section 1 of said by-law No. 946, and the same shall not be altered thereafter without the consent of the said engineer and chairman."

By an indenture made on July 10, 1905, between the company and the city, reciting the several by-laws mentioned, the company accepted the by-laws and covenanted and agreed that it would in all things conform to, obey, perform, observe, fulfil and do all and every the terms, agreements, stipulations, regulations, obligations, provisions, and things in the by-laws

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contained, and would do and perform all acts, matters, and things which the by-laws provided to be done by or on behalf of the company, and would not do anything which the by-laws provided was not to be done by the company.

On the 7th December, 1905, the Board heard at Chatham an application by the company for leave to carry and construct its line of railway upon and along certain highways in the city of Chatham and in other municipalities. The application alleged the grant by the city, under by-laws 815 and 946, of a franchise on certain named streets (among which was Queen street) and set up the approval by the Board of the location plan; but did not otherwise specify the proposed location of the railway upon the streets.

By the minutes of the acting secretary it appears that the order was to go subject to the filing of certain plans and agreements. These by-laws and the agreement referred to, and the plan shewing the proposed location on Queen and other streets, and evidence of the location upon Queen street approved by the city engineer and the chairman of the railway committee of the city council (which had in the meantime been substituted for the industrial committee for this purpose), were not furnished to the Board until July of this year. The plan shewed a location on Queen street, west of the centre line of the street and the document evidencing the approval of the location by the city engineer and chairman of the railway committee specified that "the centre line of the track shall be located nine feet four inches west of the centre line of the street, the poles 120 feet apart and on a line so that the centre of the poles shall be sixteen feet from the centre of the street."

On the 15th of July last, at Winnipeg, the Board made an order giving to the company leave to carry and construct its line of railway upon, along, and across certain named streets (among which was Queen street), as shewn on a certain plan (which was the plan shewing the location on the west side of the street), subject to the terms and conditions of the by-laws mentioned

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and the agreement of July 10, 1905. This order had been drawn in Ottawa and forwarded by the secretary to Winnipeg on July 12, with a letter stating the decision announced by the Board at Chatham, and that the plan had not yet been filed. In his letter he said:—"In this connection, however, I find that a misunderstanding has arisen in regard to the application of the company to operate its line of railway along and across certain streets in the city of Chatham, an objection having been raised by Messrs. Henderson, Small and Beaumont, on behalf of a property owner on Queen street, who is insisting on the line running down the centre of the street, as shewn on plan signed by the Board under file No. 1537, order of August 11, 1905, which recites that the plan, profile and book of reference are approved subject to the terms and conditions set forth in by-law No. 815 of the city of Chatham." The secretary also forwarded the file of papers on which was the document expressing the decision of the city engineer and chairman of committee as to the location on Queen street. The order was signed in Winnipeg on July 15, and forwarded on the same day to the secretary at Ottawa with instructions to see that the plans were first approved by the city before the order should be issued.

The plan shewing the location at the side of the road was not received by the secretary until July 18. The order was issued by him on the 19th.

In the month of June several communications passed between the secretary of the Board and Messrs. Henderson, Small and Beaumont, acting as solicitors for the present applicant, Robertson, in the course of which the solicitors asked for an opportunity of being heard before approval by the Board of the location on the side of the road; and the secretary was advised of the proceedings in an injunction suit instituted by Robertson to prevent such location, and of an agreement between the parties, one stipulation of which was, "The parties hereby agree to submit location and right of railway to run on Queen street in Chatham from Park avenue to the south city limits, to the

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Railway Board, both parties to speed the hearing before the Board.

As the Board considered that it had really decided at Chatham, in December, 1905, that the leave should be given to construct the railway along the street according to the by-laws of the city and the agreement between the city and the railway company, and as the secretary's letter did not call attention to the fact that the objecting party asked for a hearing, and the Board did not notice the correspondence upon the subject, it felt at liberty to make the order in accordance with the city's views. The matter was represented as one of urgency. It was evident upon the terms of the by-laws that the railway was one "to be operated as a street railway or tramway" within the meaning of section 235 of the Railway Act. The consent of the city to its being carried along the street was, therefore, necessary. The Board was obliged either to authorize the placing of the railway upon the street in accordance with the terms of the city's consent or to refuse the authority entirely. It would not have been possible to have heard the matter orally for over two months. The board, therefore, felt justified in accepting the conclusion of the civic authorities as to the particular location upon the street, and in making the order accordingly.

The railway company's application for leave to carry the railway along and across highways referred to the location approved by the Board's order of August 11, 1905, and asked the Board to dispense with the filing of further plans and profiles of the crossings.

It appears to me that the Board had power to do this, and to accept the location, plan and profile as if submitted under section 186 of the Railway Act, 1903, then in force.

When the matter came before the Board at Chatham in December, 1905, the Board required to be satisfied, by production of the by-laws and agreements, that the necessary consent of the city to the carrying of the line along the street had been given. When these by-laws and agreements came to be produced, it ap-

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peared that the locations upon the streets were to be fixed by officials of the city, and the Board was furnished with evidence that these officials had fixed the location along Queen street as approved by the Board's order.

It appears to me that it was quite competent for the Board to give leave to carry the railway along a different portion of the street from that set out in the plan to which the application referred, without requiring the making of a new application—and this, whether the change was made at the request of the railway company or against its will.

It appears to me, also, that it was competent for the Board to give leave to carry the railway along the street upon a location different from that shewn by the location plan approved by the Board. In approving a location plan, the Board does not usually determine precisely where a railway shall cross another railway, or where it shall run across or along a highway; and when the application to cross another railway, or to cross or run along a highway, comes before the Board, it might allow this at a different place or upon a different location from that laid down upon the approved location plan without requiring another location plan to be submitted or an application to be made to authorize a deviation; and the Board's order in such a case is sufficient to authorize the necessary deviation.

When the order in question was made, the Board had been furnished with the evidence of the location upon Queen street, fixed by the proper city officials under the by-law for this railway. The formal plan embodying this conclusion had not reached the Board, but the Board might well determine upon the material that the railway should be allowed to be carried along the street as approved by the city officials, and it might well entrust to its secretary, to whom the order was to be forwarded to be sealed and issued, the duty of examining the plan and ascertaining that it indicated the line as thus approved. I think that the Board could thus make the order, although when it was signed the plan was not yet in the secretary's hands, but

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to be issued after the receipt of the plan and the making of the comparison which the secretary was directed to make.

The company's application for leave to place its railway upon the public street was not a "complaint" which, under section 20, the Board was bound to hear and determine in open Court on application by any party to it. But the request for a hearing was not one which the Board would ordinarily refuse, and in this case, in view of the agreement for a settlement of the injunction proceedings, the order should not have been made without such a hearing. All of the parties—the city, the railway company, and Robertson—have now been heard and have adduced such evidence as they saw fit upon the question of the location of the railway along Queen street in front of Robertson's property. The railway has been constructed along the side of the street in accordance with the location prescribed by the city engineer and chairman of the committee, except opposite Robertson's property, where it has been temporarily carried along the centre of the street. The chief engineer of the Board has reported that he is "of opinion that, as the present road is a country road and not paved, the track should go as the plan originally intended—to one side; but that, if in the future Queen street should be paved as similar streets in Chatham, the tracks could be moved to the centre at very little expense."

I think it clear that the placing of the railway along the centre of the street would interfere unduly with the use of the street, and be injurious to the public interest. On the other hand, I have no doubt that the placing of the railway where the company and the civic officials desire to place it would injuriously affect Robertson's property. I am, however, of opinion that the construction and operation of the railway will materially benefit the property, and that the property, with the railway upon the side of the street, will be more valuable than if the railway should not be, or had not been, constructed at all. At present, the land is wholly vacant; a few scattered dwellings are to be found on the other side of the street, and there is a

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probability that the city will grow in that direction and that there will at some time be a demand for lots in that locality for residences, factories, warehouses, etc. The opportunity to procure spurs from this railway should enhance value for industrial or commercial purposes. While there is not, at present, a frequent service upon the railway, this must naturally be increased with the growth of the city. At one time Robertson proposed to widen the street in front of his property by giving up a strip along it for the purpose. This fact affords some evidence that such a use of this strip would leave him with property not less valuable than the whole would be if he retained the strip. If he should now widen the street in this way, the railway would then be along the centre of the street, and the remaining property, with the advantage afforded by the railway, would probably be more valuable than the whole is at the present time.

It appears to me that, if we were now hearing the original application, and had before us the evidence which has been given and the arguments advanced on Robertson's behalf, we should still make the order unconditionally, giving the company leave to carry the railway along the street as is proposed by the company and the city.

November 26, 1907. HON. MR. DEPUTY CHIEF COMMISSIONER BERNIER:—In this case two principles are involved.

1. The control, as trustee for the public, of the streets within the limits of the city of Chatham, which by by-laws has determined that the electric road of the Chatham, Wallaceburg & Lake Erie Ry. Co. should be located according to the decision of its officials.

2. The claim for damages to property owners alongside the streets where the said electric road was to be constructed and operated. I have already expressed my views with regard to the absolute power of the municipalities to fix and determine the terms and conditions with which the railway intended to be con-

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structed, would have to comply; the Board to conform its order accordingly. As to the question of compensation or damage, it rests entirely between the immediate land owners and the municipality which has chosen the location of the railway and to be determined by the ordinary Courts of justice.

The Board is not in a position to fix the compensation, as the damages cannot be appraised without the intervention of the municipality and the parties who may suffer by its decision; such power, in my opinion, having not been granted to the Board.

My opinion, therefore, is that the order should go according to the decision of the city of Chatham, leaving to the interested parties their recourse to the ordinary tribunals.

November 23. 1907, MR. COMMISSIONER MILLS:—In re the application of A. K. S. McA. Robertson for an order rescinding an order of the Board, No. 3472, dated July 15, 1907, which latter order gave the Chatham, Wallaceburg & Lake Erie Railway Company leave to lay the track of its railway along the west side of Queen street, nine feet four inches west of the centre of the said street, in the city of Chatham, Ont.

The council of the city of Chatham, wishing to have the Chatham, Wallaceburg & Lake Erie Railway run through the city, passed a by-law granting the said company leave to lay its track along the centre of Queen street, in the said city.

After a time, the city came to the conclusion that the said track on the centre of Queen street would likely interfere with farm traffic coming in from the country along the said street; so a new council, at a later date, passed a resolution directing the said company to lay its track, not in the centre of the said street, but on the west side thereof, nine feet four inches distant from the centre, the street being 66 feet wide.

It was alleged, and not denied, at the hearing, that, according to the city by-laws, a space of 21 feet wide has to be left on each side of the street for sidewalk, boulevard, curb, and gutter; and the plan approved by the order of the Board, dated July 15,

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1907, places the railway track 21 feet four inches from the west side of the street, leaving only four inches between the track and the gutter. With such an arrangement, it is manifest that horses with vehicles cannot pass or be tied between the railway track and the west side of the street, and the owner or owners of land on the west side of the street will have no access by vehicles to the front of their property.

Mr. A. K. S. McA. Robertson owns land on the west side of the said Queen street. His land has a frontage of 3,300 odd feet on the street; in fact, it extends nearly the whole distance throughout which the railway is to run on the side of the street; and his only way to make this portion of his property accessible will be to add to the street a strip of his own land, nine feet four inches wide, throughout the whole length of his frontage, viz., 3,300 odd feet.

Even if the city should change its by-law so as to dispense with a boulevard on each side of the street, it would leave only fifteen feet for a driveway including the curb and gutter, which every one of any experience knows is not sufficient for the purpose; so it is clear to my mind that Mr. Robertson's property will be materially injured by the running of the railway along the west side of the street in front of his land.

It is true that the property in question is vacant land at the present time; but it is land within the city limits—land which has paid and is paying heavy city taxes; and in case it is decided that it is a fair and reasonable thing to have the railway run so near the said land as to prevent vehicular access to the front thereof, for a distance of 3,300 odd feet, it is morally certain that a great portion of it will *remain* vacant for years to come, unless Mr. Robertson decides to widen the street at his own expense.

If the Chatham, Wallaceburg & Lake Erie Ry. Co. were a street railway proposing to give to Mr. Robertson and others in the city of Chatham a street railway service and to confer such benefits as usually result from the running of a street railway in

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a city, I would be disposed to say that the advantage of such a railway beside Mr. Robertson's land might be regarded as offsetting the damage which will result from placing the track so close to his property as to prevent vehicular access to the portion which fronts on the street; but the said railway is not a *street railway* in the city of Chatham or anywhere else, but a rural electric railway proposing to run once every hour, within certain limits, for freight and passengers, from Wallaceburg, south through Chatham, to Lake Erie. It will certainly damage the front of Mr. Robertson's property, and it is doubtful whether it will do much, if anything, to increase the value of land there or anywhere else in the city, beyond what the Grand Trunk and Canadian Pacific lines have already done.

Why should the corporation of the city of Chatham, for its own benefit, in order to accommodate the traffic which it wishes to have along Queen street, place a private citizen like Mr. Robertson at a disadvantage as compared with citizens on the opposite side of the street? And why should it make it necessary for him to add a portion of his property to the street, without allowing him any compensation therefor?

Therefore, I think the order of July 15, 1907, should be confirmed and allowed to stand *only on condition* that Mr. Robertson is allowed reasonable compensation, say $900, for the strip of his land (nine and one-third feet by 3,300 feet) which he will have to add to the street in order to get vehicular access to the front of his property, and thus make it saleable for either residential or business purposes; and as the railway was first located on Queen street by permission of the city, and the location was changed from the centre to the side of the street by the city, and solely for the benefit of the city, the city should pay the said compensation; but the question of payment is one which must be left to the city and the company to settle between themselves.

As the Chief Commissioner and I seem unable to reach an agreement in this case, it should, I presume, be left to Mr. Ber-

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nier to settle. We are agreed upon everything but one question —shall *any* compensation be allowed to Mr. Robertson for the injury done to his property facing on Queen street, and, if so, how much?

JURISDICTION OF THE BOARD—LOCATION—PRIORITY.

CANADA.] [BOARD OF RAILWAY COMMISSIONERS.

ESSEX TERMINAL RY. CO. v. WINDSOR, ESSEX & LAKE SHORE RAPID RY. CO.

(*Case No.* 152.)

Board—Jurisdiction—Railway crossings—Approval of location plans—Construction on highway—Leave of the Board and municipality—Priority—Protective appliances—Apportionment of cost—Railway Act, ch. 37, *R.S.C.*, 1906, *secs.* 26, 159, *sub-sec.* 2, 172, 174, 175, 176, 227, 233, 235, 237—*Railway Act*, 1903, *sec.* 186—6 *Edw. VII. ch.* 184(*C.*)—*R.S.O.*, 1897, *ch.* 209—23 *Vict. ch.* 96—7 *Edw. VII. ch.* 37(*O.*).

Where in a railway company's original Act of incorporation the construction of its railway along a highway, except under a by-law of the proper municipal council is expressly prohibited and the prohibition is repeated in the Act declaring the company's railway to be a work for the general advantage of Canada, the Board has power under the Railway Act, R.S.C., ch. 37, sec. 26, to prohibit the company from maintaining or using its railway upon the public highway, if constructed thereon without due authority; but

Semble, the general jurisdiction conferred upon the Board by sec. 26 apart from special circumstances does not extend to the prohibition of placing rails upon or along public highways merely because the leave of the Board has not been given. Such unauthorized acts are not usually done in contravention of the Railway Act, and being breaches of the general law forbidding the obstruction of highways are not within the jurisdiction of the Board.

An order of the Board approving location plans of a railway does not give authority to construct or operate the railway upon or across a public highway.

The railway of the Windsor Company was constructed along a public highway without the necessary authority of the municipality and the Board. The consent of the municipality or municipalities was afterwards obtained but not the requisite leave of the Board. The Board, however, granted leave to the Windsor Company to cross the Canadian

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Pacific Ry. Co.'s line upon the highway and afterwards the Essex Company, with its location plan properly sanctioned by the Board, and having the leave of the Board to cross the highway on the line of that location, applied to have the railway of the Windsor Company removed from the highway or to be allowed to cross it at the expense of the former, and to have the orders sanctioning the location plans of the Windsor Company and giving that company leave to cross the line of the Canadian Pacific Ry. Co. set aside, the Essex Company claiming a right of seniority because the construction of the Windsor Company's railway on the highway was unauthorized.

Held, 1. That while the Board had jurisdiction to require the removal of the Windsor Company's rails from the highway at the point where the Essex Company obtained leave to cross, no absolute right of priority was acquired by priority of sanction of location plans, or of leave to cross the highway, as the two railways were constructed almost simultaneously, and the application was refused by the Board in the fair exercise of its discretion, the maintenance and operation of the Windsor Company's line along the highway was authorized, and leave was given to the Essex Company to cross the lines of the Windsor Company and the Canadian Pacific Ry. Co., the cost of maintenance and operation of protective applicances at the crossings being divided equally between the two companies.

2. That the Essex Company had no status *for the purpose of its application to cross the line of the Windsor Company* to question the legality of the location of the latter's line upon the highway.

THE application was heard at Chatham on October 29, 1907.

E. D. Armour, K.C., and *J. H. Coburn*, appear for the Essex Terminal Ry. Co., the applicant.

Matthew Wilson, K.C., and *J. S. Fraser*, appear for the Windsor, Essex & Lake Shore Rapid Ry. Co., the respondent.

J. H. Rodd, appears for the townships of East and West Sandwich.

The facts are fully stated in the judgment of the Chief Commissioner and the situation will appear from the diagram:—

Armour, K.C., contended that the applicant was the senior road because its location plan was approved by the Board before that of the respondent whose railway was an obstruction to the applicant's line at the proposed crossing and was not a railway at all not having been authorized to be constructed along or upon the public highway by the municipality. Both the muni-

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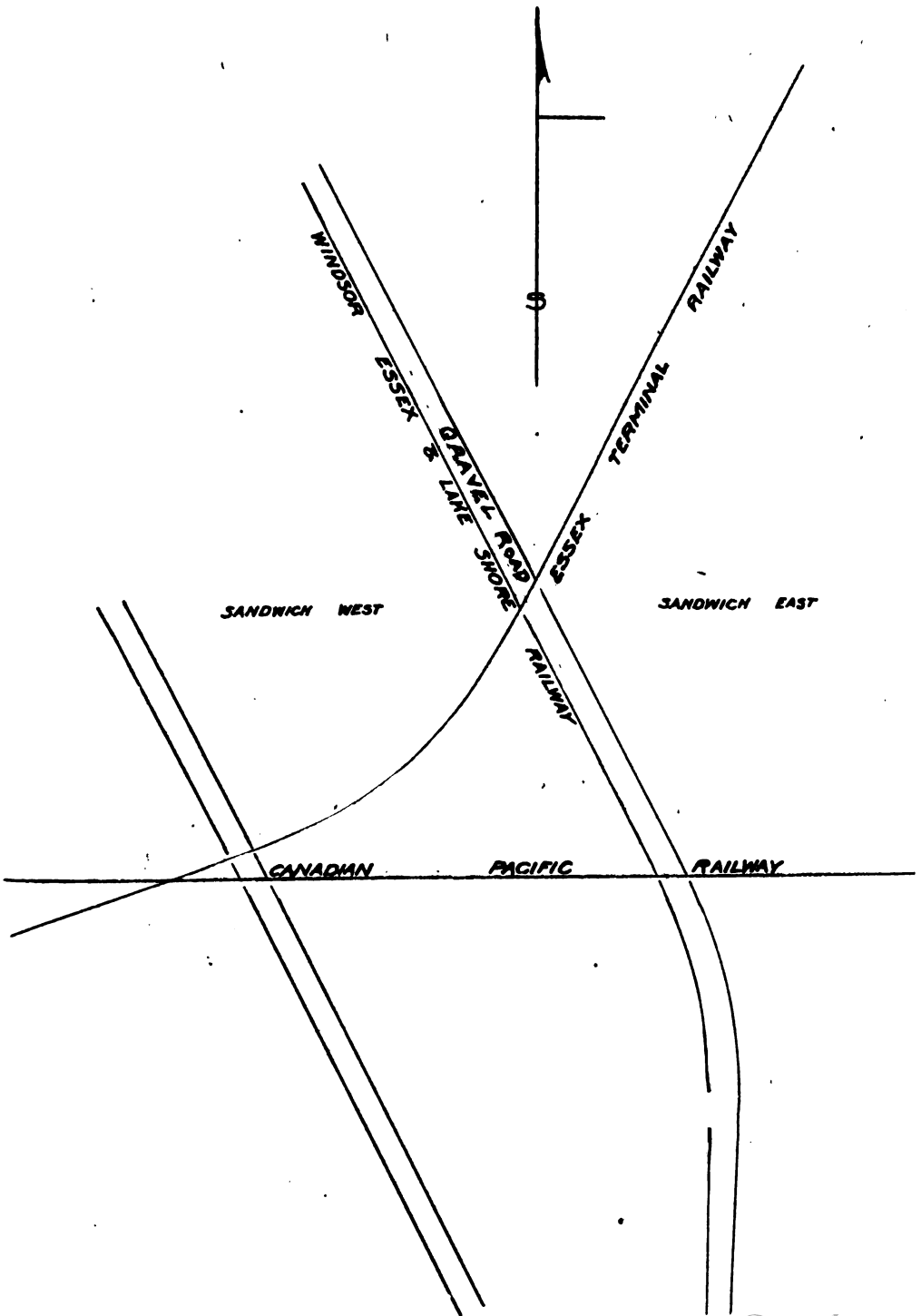

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cipalities of East and West Sandwich should have authorized the construction, because although the public highway was wholly within the township of Sandwich West still both East and West Sandwich had jurisdiction over it under the Municipal Act. The fact that the respondent had constructed its railway first under the authority of an Act of the Ontario Legislature did not put it in any better position because it had not complied with the provisions of that Act and its special Act as to securing the leave of the municipality to construct the railway upon the highway. The consequence of the applicant being the senior road, imposed all the cost of shifting tracks, construction, maintenance and operation of the crossings over the Essex Terminal and Canadian Pacific Ry. Cos. upon the respondent as being the junior railway.

Wilson, K.C., contended that the respondent railway having been constructed, and such construction acquiesced in by the municipality although not properly authorized, cured any lack of authorization, citing *Township of Pembroke* v. *Canada Central Ry. Co.*, 3 O.R. 503.

That Mr. Armour had confused the public highway which was entirely within the township of West Sandwich with township roads which lie between townships separating them.

Armour, K.C., in reply.

Rodd. The municipalities do not join in the claim of either party, though preferring the respondent.

December 5, 1907. THE CHIEF COMMISSIONER:—This is an application by the Essex Terminal Railway Company, a company incorporated by the Parliament of Canada and authorized by its Act of incorporation to construct and operate a certain line of railway, for the rescission of three orders of the Board, dated respectively June 5, 1906, March 13, 1907 and March 22, 1907, and for an order requiring the Windsor, Essex & Lake Shore Rapid Railway Company to remove its track or other obstruction laid by it upon the Gravel Road at the point where

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the Essex Terminal Railway Company proposes to cross the same, and forbidding the Windsor, Essex & Lake Shore Rapid Railway Company to continue its tracks or other obstruction upon that highway at such proposed point of crossing, or, in the alternative, for an order, under section 237 of the Railway Act, permitting the Essex Terminal Railway Company to construct its railway at rail level across the track of the Windsor, Essex & Lake Shore Rapid Railway Company, now constructed on the Gravel Road, in the township of Sandwich West, in the county of Essex, Ontario, or for such further or other order as to the Board may seem meet.

The Windsor, Essex & Lake Shore Rapid Railway Company was incorporated by Act of the Legislature of the province of Ontario with power to construct and operate by electric power a railway from the city of Windsor to Lake Erie.

On August 12, 1905, the municipality of the township of Sandwich West passed a by-law by which it granted leave to the Windsor, Essex & Lake Shore Rapid Railway Company, "To lay out, construct, complete, and operate an electric railway consisting of a single track with the necessary switches and turnouts, and to erect all poles, wires and necessary overhead construction for the completion of said railway on the trolley system and its operation by running cars thereon by means of electricity as motive power, in, upon and along" the highway known as the Gravel Road at the southerly limit of the city of Windsor, thence southerly along the west side of the town line road to the Talbot road.

Paragraph 3 of the by-law provided: "The municipal corporation of the township of Sandwich West gives and grants to the Windsor, Essex & Lake Shore Rapid Railway Company, their successors and assigns, the right to keep, maintain, and use their tracks and railway poles and overhead construction on the said roads and highways, and thereon to operate the railway and its cars, carriages, motors and machines for the carrying of passengers, mails, express and freight during the term

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hereinafter specified, upon and subject to the conditions hereinafter mentioned and contained."

There followed a number of provisions more or less onerous upon the railway company; and paragraph 15 provided: "This by-law and the powers and privileges hereby granted shall not take effect or be binding upon the municipal corporation of the township of Sandwich West unless formally accepted by the company, which said acceptance shall be filed with the township clerk within thirty days from the passing hereof."

On September 12, 1905, there was filed with the clerk of the municipality an acceptance of the terms of the by-law signed by the secretary of the railway company, but not under the seal of the company.

In 1905, a line of the Windsor, Essex & Lake Shore Rapid Railway Company was graded along the Gravel Road; ties were distributed along the road during the following winter or spring; and the rails were laid in the spring or summer of 1906. The weight of evidence appears to be in favour of the view that the roadbed had been prepared and the ties placed thereon, at and on each side of the point where the Essex Terminal Railway Company has been authorized to cross the Gravel Road, before April 4, 1906, when the location of that company's line was approved; and that the rails were laid after April 4, and before July 30, 1906.

On July 13, 1906, the Parliament of Canada passed an Act, 6 Edw. VII. ch. 184, declaring the railway works which the Windsor, Essex & Lake Shore Rapid Railway Company had been empowered to undertake, by virtue of the Acts of the Legislature of Ontario relating to it, to be for the general advantage of Canada. This Act made the Railway Act, 1903, and amendments thereto, applicable to the company to the exclusion of the Electric Railway Act of Ontario or any provision of the company's Act of incorporation or amending Act inconsistent therewith; but provided that nothing therein should affect any action theretofore taken pursuant to powers in such Acts con-

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tained; and section 8 of the Act provided that, "Notwithstanding anything in the Railway Act, 1903, the company shall not construct or operate its line of railway along any highway or other public place without first obtaining the consent (unless such consent has already been obtained), expressed by by-law, of the municipality having jurisdiction over such highway or other public place, and upon terms to be agreed on with such municipality."

The location plans of the Essex Terminal Railway Company were approved on April 4, 1906.

On July 30, 1906, the Essex Terminal Railway Company applied "for an order, under section 186 of the Railway Act, 1903, permitting it to construct its railway across the Maisonville road, the Talbot road, and the Gravel Road, existing highways in or partly in the township of Sandwich East, in the county of Essex, and province of Ontario;" and, on March 7, 1907, an order was made authorizing the last mentioned company to construct its railway across the Maisonville road and the Gravel Road.

On December 11, 1906, the Essex Terminal Railway Company applied to the Board for an order "permitting it to construct its railway across the track of the Windsor, Essex & Lake Shore Rapid Railway now constructed on the Gravel Road in the township of Sandwich West, in the county of Essex and province of Ontario." By that application it was alleged that "the respondent" (meaning the Windsor, Essex & Lake Shore Rapid Railway Company) "has, during the present year, constructed its railway on the said highway at the point where the applicant desires to cross the same. The municipal council of the said township of Sandwich West, on September 15, 1906, consented to the applicant's proposed crossing of the said highway. Prior to September 16, 1906, the respondent was without lawful authority to construct a railway on the said highway."

A line of railway of the Canadian Pacific Railway Com-

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pany, running from Windsor eastward through the province of Ontario, crosses the Gravel Road, and, on June 5, 1906, the Board made an order authorizing the Windsor, Essex & Lake Shore Rapid Railway Company to cross with its track the tracks of the Canadian Pacific Railway Company at the point where the railway of the last mentioned company crossed the Gravel Road.

The Essex Terminal Railway Company also applied to the Board for leave to cross with its railway the track of the Canadian Pacific Railway at a short distance from the point of crossing of the Canadian Pacific Railway by the Windsor, Essex & Lake Shore Rapid Railway Company.

The application of the Essex Terminal Railway Company to cross the tracks of the Windsor, Essex & Lake Shore Rapid Railway Company came up for hearing before the Board on March 19, 1907, when the Essex Terminal Railway Company claimed a right of seniority over the Windsor, Essex & Lake Shore Rapid Railway Company on the ground that the construction of the Windsor, Essex & Lake Shore Rapid Railway Company along the Gravel Road was without lawful authority. The Board decided that the Essex Terminal Railway Company had "no status, *for the purpose of its application to cross the line of the Windsor, Essex & Lake Shore Rapid Railway,* to question the legality of the location of the latter line upon the public highway, or the title in any other respect of the Windsor, Essex & Lake Shore Rapid Railway Company to the land on which its line is located." The Board also decided, upon the advice of its engineers, that it was not proper to allow three railway crossings at the distance at which these would be apart, if the application of the Essex Terminal Railway Company for these crossings should be allowed, and that the lines of the Canadian Pacific Ry. Co. and the Windsor, Essex & Lake Shore Rapid Railway Company should be crossed by the Essex Terminal Railway Company at the then existing crossing of the Canadian Pacific Ry. Co. by the Windsor, Essex & Lake Shore

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Rapid Ry. Co., and that the expense of constructing these two crossings and the necessary changes in the interlocking and safety appliances at that point should be borne by the Essex Terminal Railway Company, the expense of operation and future maintenance to be divided between the Essex Terminal Railway Company and the Windsor, Essex & Lake Shore Rapid Ry. Co. in the proportions of two-thirds thereof by the former and one-third by the latter company. The Board further intimated that, with the consent of the Windsor, Essex & Lake Shore Rapid Ry. Co., the Essex Terminal Railway Company would be allowed to remove the place of crossing of the three lines to another point, all costs incidental to such removal and the making of the new crossing to be borne by the Essex Terminal Railway Company, the Board expressing the opinion that, whatever the point of crossing, all the expense thereof, except the Windsor, Essex & Lake Shore Rapid Ry. Co.'s then present expense of maintenance of its proportion of the cost of operation, should be borne by the Essex Terminal Railway Company.

These conclusions having been announced to the parties, some further points were raised by the Essex Terminal Railway Company; but, in the end that company withdrew its application to cross the Windsor, Essex & Lake Shore Rapid Ry. Co.

The present application was made on June 29, 1907. The orders sought to be rescinded are the order authorizing the crossing of the line of the Canadian Pacific Ry. Co. by the Windsor, Essex & Lake Shore Rapid Ry. Co., an order granting an extension of time for installing some appliances under the first mentioned order, and an order of March 22, A.D. 1907, sanctioning and approving the location of the Windsor, Essex & Lake Shore Rapid Ry. Co.'s line between Windsor and Leamington, in the county of Essex, which includes the line along the Gravel Road.

By the Act of incorporation of the Windsor, Essex & Lake Shore Rapid Ry. Co. the provisions of the Electric Railway Act

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of the province of Ontario, R.S.O. 1897, ch. 209, were incorporated with and made to form part of the special Act. By section 9, sub-section (*c*) of that Act, it was provided that "the said railway or any part thereof, so far as the same may be operated by electricity, may be carried along and upon such highways as may be authorized by the by-laws of the respective corporations having jurisdiction over the same, and subject to the restrictions and provisions therein and in this Act contained, and under and subject to any agreements between the company and the councils of any of the said corporations."

By section 37 of the Electric Railway Act "the railway, its cars, carriages, engines, motors or machinery shall not be carried, operated, or worked on, upon, or along any street, highway, or public place of any municipality unless first authorized by an agreement in respect thereof made between the company and such municipality, with the approval of a two-thirds vote of the members of the council of such municipality, and under and subject to the terms of such agreement and of this Act and of any by-law or by-laws of the council of said municipality, to be passed in pursuance thereof."

On July 20, 1907, the council of the township of Sandwich West passed a by-law by which it was provided as follows: "The consent, permission, approval, and authority of the municipal council of the corporation of the township of Sandwich West is hereby given to the Windsor, Essex & Lake Shore Rapid Ry. Co. to construct and operate its line of railway through and across said township in the course located, sanctioned and approved by the Board of Railway Commissioners for Canada or by the Minister of Railways for Canada, in which course the said railway is now constructed."

On the same day a similar by-law was passed by the council of the township of Sandwich East.

The townships of Sandwich East and Sandwich West at one time formed one township. They were divided by Act of the Parliament of the late province of Canada, 23 Vict. ch. 96.

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Under that Act the boundary line between the two townships was the east line of the Gravel Road, thereby leaving the Gravel Road entirely within the township of Sandwich West.

I adhere to the view which we took upon the former application of the Essex Terminal Railway Company to cross the line of the Windsor, Essex & Lake Shore Rapid Ry. Co., that, *for the purposes of such an application*, the Essex Terminal Railway Company had no status to question that right of the Windsor, Essex & Lake Shore Rapid Ry. Co. to construct its line along the Gravel Road. The company was given by the Legislature of the province of Ontario the right to construct a certain line of railway. The provisions forbidding it to run that line along a public highway, without the consent of the proper municipal council or councils, were made, as it appears to me, for the purpose of determining the circumstances under which the railway company could thus place upon a highway what would otherwise be an unlawful obstruction; and, for the purpose of an application for a railway crossing, the question of highway obstruction was not material. When that application was being considered, it was not brought to our attention that an order authorizing the construction of the Essex Terminal Railway across the Gravel Road at its now proposed point of crossing had actually been made. It appears to me that the position of the Essex Terminal Railway Company under that order is very different from its position as a mere applicant for leave to carry its line across the line of another railway company.

In the case of *The Montreal Street Railway Company* v. *The Montreal Terminal Railway Company*, 35 S.C.R. 478; 36 S.C.R. 369; 4 Can. Ry. Cas. 369, 373, the Supreme Court of Canada held that a railway company which was constructing a line of railway to be operated as a street railway or tramway along a highway in an incorporated town, without the consent of a legal by-law of the municipal authority of the town, although having the leave of the Board of Railway Commissioners, therefor could not lawfully place its railway upon the highway, and

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an appeal from an order of the Board directing another railway company so to move rails and other obstructions laid down by the last mentioned company upon the highway was allowed on that ground. By the terms of the Board's order, as set out in the report, it appears that the rails and obstructions directed to be removed had been placed upon the highway after the making of the Board's order giving leave to the one company to construct its line upon the street. Objection was apparently not made to the jurisdiction of the Board to make such order in a proper case. Counsel for the respondents supported the order on the ground that the laying of the tracks which obstructed the line authorized by the Board constituted a violation of the Board's order. The question whether the Board has jurisdiction to compel the removal from highways of railway tracks laid there without proper authority was really not determined. The inclination of my opinion hitherto has been to the view that the general jurisdiction conferred upon the Board by section 26 of the Railway Act does not extend to the prohibition of placing railway tracks upon or along public highways merely because the leave of the Board, or that of a municipality (when required by law) has not been given. The placing of railway tracks or other obstructions upon public highways without lawful authority is not usually an act done in contravention of the Railway Act or of a railway company's special Act. Usually, it is merely a contravention of the general law against obstructing highways, which it is not within the province of the Board to administer or enforce. But when the Board, acting within its powers, gives leave to a railway company to construct its railway upon, along, or across a public highway, it is expressly given additional powers with reference to the highway. By section 237, the Board is empowered to "grant such application upon such terms and conditions as to protection, safety and convenience of the public, as it may deem expedient," and may order "that such works be executed, watchmen or other persons employed, or measures taken as under the circumstances appear

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to the Board best adapted to remove or diminish the danger or obstruction arising or likely to arise therefrom."

It may not unreasonably be claimed that these provisions enable the Board to require the removal of unlawful obstructions necessary to be removed in order to the safe construction and operation of the line authorized to be laid upon or across the highway. But, in the case of the Windsor, Essex & Lake Shore Rapid Ry. Co. there is a further consideration. The company's original Act, incorporating into it the provisions of the Electric Railway Act, expressly prohibited the construction of the company's railway along a highway except under by-law of the proper municipal council. That prohibition was repeated in the Act declaring the company's railway to be a work for the general advantage of Canada. The Board would, therefore, in my opinion, have power, under the jurisdiction given by section 26 to forbid the doing or continuing of an act, matter, or thing contrary to the company's special Act, to prohibit the company from maintaining or using its railway upon the public highway if constructed thereon without due authority.

It appears to me that, on July 13, 1906, when the Act of Parliament declared the company's railway works to be for the general advantage of Canada, the construction and operation of the railway of the Windsor, Essex & Lake Shore Rapid Ry. Co. along the Gravel Road had not been effectively authorized by by-law of the municipality having jurisdiction over the same. The provision of the by-law of August 12, 1905, requiring acceptance to be filed with the township clerk within thirty days from the passing of the by-law, seems to me to have been a condition precedent to the operation of the by-law; and I think that, through the company's failure to comply with the condition within the time limited, the by-law never became operative.

It is unnecessary, therefore, to consider other questions as to the sufficiency of the acceptance or the necessity of authority from the township of Sandwich East. The approval by the Board of the company's location plans does not seem to have

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been necessary. The railway had been located, and the construction of a considerable portion of it nearly completed, when the Act declaring it to be a work for the general advantage of Canada was passed.

As, however, the construction and operation of the railway upon the public highway had not been authorized under the provincial law, it was necessary for the company to obtain authority therefor from the Board under sections 235, 237 of the Railway Act or the corresponding sections of the Act of 1903. The order approving the location plans did not operate to give such authority. By section 159, sub-section 2, of the Railway Act, "the Board by such sanction shall be deemed to have approved merely the location of the railway and the grades and curves thereof, as shewn in such plan, profile and book of reference, but not to have relieved the company from otherwise complying with this Act."

The land across which a railway is sought to be located may belong to the Crown, or be part of an Indian reserve, and the consent of the Governor-in-Council to its use or occupation by the company may be necessary under section 172 or 175 of the Railway Act, or it may have been reserved for naval or military purposes, when the license and consent of the Crown under the hand and seal of the Governor-General is required by section 174. It may belong to another railway company, in which case the new company cannot use or occupy it without the leave of the Board under section 176, which, in approving the location plan, would not bind itself to grant such leave. The line may cross navigable waters, when the site, as well as the plans, must be approved by the Governor-in-Council under section 233.

In deciding whether to sanction plans and profiles shewing the proposed location of a railway, the Board does not usually consider matters of this kind or questions as to the existence of public highways along the route, or whether such highways or railways shall be crossed by the proposed new railway, or, if so, where or how, or the measures to be taken for the safety of the

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public or otherwise in connection with such crossings, or whether, or where, the railway shall be operated upon or along a highway, or on what portions thereof, or the provisions to be made in connection with the same; and orders sanctioning such locations should not be considered as impliedly authorizing obstruction of highways by railway works.

This is the settled jurisprudence of the Board.

And it was not a necessary condition precedent to the approval of the location plans that the party should first have the consent of the municipal authority to the construction of the railway upon the public highway. This might be left until the company ascertained whether the proposed location would meet the approval of the Board from an engineering standpoint.

But the company has now obtained the consent of the townships of Sandwich East and Sandwich West to the construction and operation of its railway along the Gravel Road, expressed by by-laws of those municipalities, as required by the Act declaring the company's works to be for the general advantage of Canada; and it is now within the power of the Board to give the necessary authority under sections 235 and 237 of the Railway Act.

It has been contended before us by counsel for the Essex Terminal Railway Company that these by-laws are invalid for want of approval by the Lieutenant Governor in Council of the province of Ontario, under section 3 of the provincial Act, 7 Edw. VII. ch. 37.

It is open to question whether such an enactment by a provincial legislature is operative to affect a by-law of a municipality required by Act of the Parliament of Canada; but such a question does not appear to arise in the present case. As I read the provincial Act, it applies only to companies whose undertakings have been, since February 19, 1907, or shall hereafter be, declared by the Parliament of Canada to be works for the general advantage of Canada (omitting for consideration cases of absorption, amalgamation, etc., not now material.) "Any

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such company or corporation," referred to in section 3 of the Act, evidently is "such company or corporation" as is referred to in section 2, in which the same expression several times occurs.

Then, the position which we have is this:—The railway of one company has been constructed along a public highway without the necessary authority from the municipality or the Board; the required consent of the municipality or municipalities has since been obtained, but not the requisite leave of the Board; with the authority of the Board it crosses, upon that highway, another railway; another company, having its location plan properly sanctioned by the Board and the leave of the Board to cross the highway on the line of that location, seeks to have the existing railway removed from the highway or to be allowed to cross it at the expense of the former, and to have the orders sanctioning the location plans of the first company and giving that company leave to cross the previously existing railway, set aside.

While, as I have said, I think the Board has jurisdiction to require the removal of the rails from the highway at the point where the Essex Terminal Railway Company has leave to cross, I do not think that we are bound to do this. I think that we are entitled to exercise our discretion, in view of all the circumstances; that, in the fair exercise of that discretion, we may now authorize the maintenance and operation of the Windsor, Essex & Lake Shore Rapid Ry. Co. along the Gravel Road, and give leave to the Essex Terminal Ry. Co. to cross it and the Canadian Pacific Ry. Co.'s line near the present railway crossing in such manner and with such protective appliances as our engineer shall recommend, but varying the condition as to apportionment of the cost of maintenance and operation by dividing it equally between the two companies, instead of imposing two-thirds upon the Essex Terminal Railway Company. But if the Essex Terminal Railway Company still finds it necessary in its own interests to have the point or points of crossing differently placed, that company should bear the expense of remov-

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ing the line of the Windsor, Essex & Lake Shore Rapid Ry. Co. to the new point of crossing.

In such a case as this, I do not think that we are bound to recognize that an absolute right of priority in regard to such crossings is acquired by priority of sanction of location plans, or priority of leave to cross or run along highways. The two railways were being constructed almost simultaneously. The original by-law of the township of Sandwich West failed to take effect only through one day's default, and possibly, through a slip in the method of attempted acceptance, but for which the railway would have been lawfully upon the highway when the Dominion Act was passed, and long before the Essex Terminal Railway Company obtained the Board's leave to cross the highway. The case appears to be one for the exercise of the Board's discretion.

If, as previously asked, the Essex Terminal Railway Company desires to have a case reserved for the opinion of the Supreme Court upon any substantial legal question or questions which the Board considers would materially affect its conclusions upon the disposition of that company's application, this may not unreasonably be allowed, provided that this does not involve delay in authorizing the maintenance and operation of the Windsor, Essex & Lake Shore Rapid Ry. Co. upon the Gravel Road, and its lawful opening for traffic.

NOTE.—A case has been stated by the Board for the opinion of the Supreme Court, and is now standing for argument.

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COMPETITIVE RATES—UNJUST DISCRIMINATION.

CANADA.] [BOARD OF RAILWAY COMMISSIONERS.

BRITISH COLUMBIA PACIFIC COAST CITIES v. CANADIAN PACIFIC RY. CO.

(*Vancouver Interior Rates Case, No.* 104.)

East and Westbound rates—Unjust discrimination between localities—Undue preference—Similar parties and under similar conditions—Long and short haul—High cost of operation and maintenance of railway Eastward—Main line—Natural dividing line—51 *Vict. ch.* 29, *sec.* 232—60-61 *Vict. ch.* 5, *sec.* 1 (*D.*)—*Water competition.*

The Boards of Trade of British Columbia Pacific Coast cities complained that the rates levied on all classes of goods from Vancouver to interior points in British Columbia and the North-West Territories as far East as Calgary on the main line and to MacLeod on the Crow's Nest line were discriminatory as against them, as compared with the rates on West bound traffic from Winnipeg to the same territory.

Held, 1. Mr. Commissioner Mills dissenting, that the evidence as to the cost of operation and maintenance upon different sections of the main line shewed that the rates from Pacific Coast points Eastward were really lower than those from Winnipeg Westward, than if they were based upon the proportionate expense, that the natural dividing line, or average points of meeting are as fairly situated, and the Eastward rates lower as compared with similar railway companies in the United States, and that the traffic on the prairie lines being heavier than in British Columbia lower rates can be charged thereon.

2. That low rates to the Pacific Coast are necessary to enable the railway companies to obtain traffic in competition with ocean carriers. Such a practice is distinctly authorized by the Railway Act, and does not involve unjust discrimination, unless the higher rates from Eastern points to interior Western are unjust or unreasonable.

The mere fact that Westbound rates from Winnipeg or any other point to an interior Western point, are less than the rates formed by a combination of the rates from such Eastern points to a Pacific point and from the latter to the interior points does not in itself constitute unjust discrimination or undue preference.

3. A mere comparison of distances upon different portions of a railway for the purpose of shewing that higher rates are charged for shorter distances over a line with small business or expensive in construction, maintenance and operation as compared with one with large business or inexpensive in construction, maintenance and operation does not establish a charge of unjust discrimination.

To justify such a charge the nature of the particular lines must be shewn and that there is a material disproportion of rates as against the shorter line after making due allowance for the circumstances above mentioned.

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4. When the Act to authorize a subsidy for a railway through the Crow's Nest Pass [60-61 Vict. ch. 5, sec. 1(D.)] was passed and the railway company agreed in return for such subsidy to charge lower tolls upon certain classes of goods from Fort William and all points East to all points West, the Railway Act of 1888 (51 Vict. ch. 29, sec. 232) then prohibited unjust discrimination between localities, and Parliament should not be considered as having authorized what would, if done otherwise, have produced unjust discrimination between localities, accordingly the rates from Pacific points Eastward should be proportionately reduced upon similar traffic carried under similar circumstances.

Held, that the complaint should be dismissed, except in so far as it relates to classes of traffic on which reduced rates were given under 60-61 Vict. ch. 5, sec. 1(D.).

The application was heard at Ottawa on March 6, 7 and 8, 1906.

Hon. Joseph Martin, K.C., appears for the Vancouver Board of Trade.

F. H. Phippen, K.C., appears for the Winnipeg Board of Trade.

Hon. A. G. Blair, K.C., appears for the Canadian Pacific Railway Co.

Blair, K.C., raised a preliminary objection to the form of application. "Discrimination" is not an offence under the Railway Act, 1903, there must be "unjust discrimination,"

Under section 252 (Railway Act, 1903), unjust discrimination can only be made out when the tolls are discriminatory upon the same line and portion of the line running in the same direction and the same class of traffic under substantially similar circumstances and conditions.

Section 253 called the "facility clause" in England and the United States, deals with undue or unreasonable preference and advantage and would not apply to a charge of unjust discrimination against a railway company.

Under section 254 it might be thought that if there is discrimination on any portion of the line between persons trading on different portions of it the Board would have jurisdiction and would be justified in holding that there had been unjust

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discrimination, but a careful reading of the section will shew that it has been framed to regulate procedure before the Board and casts upon the railway company the onus of disproving that there has been unjust discrimination and that section 254 does not widen the scope of the clauses of the other sections mentioned.

The authorities shew that even if the traffic is carried in another direction, no matter how great the difference, that cannot be relied on as evidence of unjust discrimination.

The Board could, under its general jurisdiction, call upon the railway company to reduce its tariff or disallow the tariff under which the railway company is imposing the tolls complained of, but you cannot charge unjust discrimination upon a mere claim of that kind.

The complainants have simply charged unjust discrimination leaving the railway company to find out what such discrimination consists of and how it ought to be proved instead of asking the Board to disallow the rates as being unreasonable and excessive under the provisions of section 257.

Phippen, K.C., on the same side.

Martin, K.C. Section 2 of the English Railway and Canal Traffic Act, 17 & 18 Vict. ch. 31, is practically contained in our sec. 253 of the Railway Act, 1903, which it is contended does not apply to the case of two different localities on different parts of the railway. The following cases support my contention: *Town Commissioners of Newry* v. *Great Northern Ry. Co.,* 7 Ry. & C. Tr. Cas. 184; *Interstate Commerce Commission* v. *Baltimore & Ohio Ry. Co.,* 145 U.S.R. 263; and *Great Western Ry. Co.* v. *Sutton,* L.R. 4 H.L. 226, and shew also that the railway has no right to give a lower rate to Winnipeg merchants to assist them to distribute goods at British Columbia interior points.

Commercial centres do not exist. Under the statute every locality is entitled to come and point out to the Board that some other locality has an advantage over it as to rates in reaching a certain point in Canada. The fact of the importance or unim-

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portance of places properly suited to commercial enterprise or not, does not make any difference.

The respondents by their tariff try to destroy the natural advantages of Vancouver in favour of Winnipeg. The original cost of transportation does not affect the issue.

Rates cannot be based upon mileage or cost of operation, but upon what the traffic will bear. And that is practically what railway companies do, citing in support of this contention, American Railroad Rates by W. C. Noyes, pp. 17, 39 and 42. Cost of construction of section in mountains cannot be regarded, that part of railway was a present from the Government.

As to the effect of the dividing line and the difference in population, the contention is not as against the rates themselves on the United States and Canadian railways, but that there is unjust discrimination. The common carrier has arrogated to itself the right to charge different rates to individuals, firms or industries and thus retard the development of the Pacific Coast and makes the Alberta consumer pay more, but the carrier must develop the whole country giving every party and place the same treatment. The following cases were cited on the question of unjust discrimination, *Johnston* v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 9 I.C.C. Rep. 221; *Wilmington, Portsmouth & Virginia Tariff Association* v. *Cincinnati, etc., Ry. Co.*, 9 I.C.C. Rep. 118; *Mayor and Council of Tipton* v. *Louisville & Nashville Ry. Co.*, 9 I.C.C. Rep. 160; *Hilton Lumber Co.* v. *Wilmington & Weldon Ry. Co.*, 9 I.C.C. Rep. 17; *Kindal* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 9 I.C.C. Rep. 106; *Mayor and Council of Wichita* v. *Chicago, Rock Island and Pacific Ry. Co.*, 9 I.C.C. Rep. 569; *Martin* v. *Louisville & Nashville Ry. Co.*, 9 I.C.C. Rep. 581; *Board of Trade of Dawson* v. *Central Georgia Ry. Co.*, 8 I.C.C. Rep. 142; *Board of Trade of Troy* v. *Alabama Midland Ry. Co.*, 6 I.C.C. Rep. 1; of origin of the freight, *Cannon Falls* v. *Chicago & Great Western Ry. Co.*, 10 I.C.C. Rep. 650; of benefit arising from location, *Freight Bureau of Circinnati* v. *Cincinnati, New Orleans & Texas Paci-*

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fic Ry. Co., 7 I.C.C. Rep. 180; of a preference without an excuse would be an undue and unreasonable one, *New York Produce Exchange* v. *Baltimore & Ohio Ry. Co.*, 7 I.C.C. Rep. 612, at p. 659. The Interstate Commerce Commission lays down the proposition that a railway company must not discriminate for reasons of their own such as getting re-shipments, *Savannah* v. *Louisville & Nashville Ry. Co.*, 8 I.C.C. Rep. 377.

The Board decided to hear the application.

Blair, K.C.:—The rate basing point for Western traffic is Fort William or Port Arthur and not Winnipeg, the rates to Winnipeg are balances of the through rate, all points West of Winnipeg are dependent upon and governed by the through rate. These rates are ascertained upon and governed by the competition of other railway companies by what you have to pay to carry traffic to the Pacific Coast. Find out the rate by steamer or other craft on the ocean from the point of origin or of production, and we will tell you if we can do any business at all, how much, and at what rate. The rate on the Canadian Pacific is governed and controlled by ocean competition Westward, although its whole length is not subject to such competition. The rates to Vancouver are practically the same as those at San Francisco, Tacoma, Seattle and Portland. At the Eastern end the rates at Fort William or Port Arthur are equal to those at Duluth, St. Paul or Minneapolis. The rates out of Winnipeg through the Western country to Calgary and other interior points are based upon the rates from the basing point Fort William to the same points. For example, assuming that the rate from Fort William to Calgary is $1.00 per 100 lbs., and the rate to Winnipeg 40 cents, the "balance," or rather the difference, 60 cents, would be charged to Calgary plus a terminal charge at Winnipeg. Any change in the balances of through rates to Winnipeg would mean changes to all points West thereof.

The railway company is entitled, after having carried traffic, at a lower rate to the Pacific in order to get enough to pay it, to

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recoup its losses by means of the rates it may impose to the interior points. The question of through rates and ocean competition are inextricably bound up with one another. These through rates are distinctly authorized by sub-section 3, section 252, Railway Act, 1903, competition is at the basis of the whole matter of freight rates.

Interstate Commerce Commission v. *Alabama Midland Ry. Co.*, 168 U.S.R. 145, and *Interstate Commerce Commission* v. *Louisville & Nashville Ry. Co.*, 190 U.S.R. 273, were cited in support of the principle that when a railway company can get away from the conditions resulting from water competition or water and rail competition and is free from that control, the company is entitled to impose a rate much higher than the competitive rate which will be regarded as just and reasonable as long as such rate is not unreasonable and excessive for the service rendered. The expenses of operation are 56½ per cent. on the Central division as compared with 88 per cent. on the Pacific division, outside of all fixed charges, interest and dividends. The result is that if the whole line of the Canadian Pacific produced no better results than the Pacific division it would become insolvent.

It is said that there are no such things as commercial centres and that they are not authorized by the law. The law does not condemn the universal usage of railway companies to adjust their tolls so as to lead to the establishment of important business centres as distributing points. Winnipeg is a good example of a natural commercial centre, favourably situated, the result of natural causes and not built up by a railway, but such a place will grow and improve because the railway must carry people and traffic to and from an important point. Calgary, Nelson, Regina, Moose Jaw and other similar points are all naturally opposed to being deprived of the benefits which they have properly and legitimately enjoyed in the past.

"Gradients largely determine the cost of operation and the size of the train load that can be moved. The density of traffic

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must determine the rate more than any other factor." Noyes American Railroad Rates, pp. 83 and 526. These conditions are present in favour of distribution from Winnipeg to Calgary and against distribution from Vancouver to Calgary.

By calculating on the mileage basis it is attempted to shew that the rates from Winnipeg to British Columbia points constitute unjust discrimination against Vancouver, because Winnipeg is 200 miles nearer to these points, and that the rates should be lower than from Duluth, St. Paul and Minneapolis to the same points, but this is unfair because Winnipeg is not a basing point but a distributing point and the rates from Duluth, St. Paul and Minneapolis, which are basing points, should be compared with the rates from Fort William and Port Arthur, also basing points, and these will be found to be equal, the basing point in both countries being fixed at the beginning of the long rail haul Westward, or the head of water navigation into the interior. Minneapolis and St. Paul lie at the Western extremity of the Eastern system of railways. The transcontinental railways are supposed to commence where the Eastern lines end, so that Minneapolis and St. Paul naturally are regarded as points where the rates meet or as the proper basing point for railway schedules. The Vancouver Board of Trade. although they have the immense advantage of very low rates from the world's producing centres, on account of being an ocean port, want the further advantage of lower rates to the interior points of British Columbia or that the rates from Winnipeg to the same points should be raised, which means that rates on the manufactured products of the Eastern Canadian cities will be raised as well as on the imports received at the Atlantic ocean ports because the Winnipeg rates are balances of through rates from the East.

The population of British Columbia is 178,000, and of Washington and Oregon 1,259,000. The majority of the population in British Columbia is in the cities and on Vancouver Island; resulting in very little local traffic. The Canadian Pacific operates under adverse weather conditions during the winter months,

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necessitating the construction of heavy works to shelter the tracks from exposure to severe snow and rain storms, larger gangs of men are kept for emergencies in case of accidents. Higher wages are paid in the mountains than on the prairie.

The train haulage and maintenance of the railway cost double in the mountains. One-third of all the loaded cars that go East from Vancouver return to the same point empty. That would be a partial justification for charging higher rates. Practically all their cars come from East of Winnipeg.

The raising of the rates from Winnipeg would dislocate the existing scheme of tariffs in that district and throw the business into the hands of the Vancouver merchants for a time until the railway companies in the United States had built branch lines into Canadian territory, and by charging lower tolls, would completely block traffic to the West by the Canadian Pacific Railway and prevent it from giving advantages in trading rates to certain localities, a recognized practice by all railways, which has built up the cities of Western Canada and especially Vancouver.

Phippen, K.C.:—The present case is a contest between the traders of Winnipeg and Vancouver; each body is deeply interested in securing the business of the country and the railway company is only interested in its rates.

The same principle of distribution and division of the freight rates has been in existence since the construction of the railway, when Winnipeg was yet a hamlet and Vancouver did not exist. Any alteration in rates would ruin the Winnipeg merchants. By sub-section 3 of section 252 of the Railway Act, 1903, "no toll shall be charged which unjustly discriminates between different localities." The onus is on somebody else than Winnipeg to shew why the existing conditions should not be continued.

If effect is given to Vancouver's contention the protective tariff will be destroyed in Western Canada. See *Export & Domestic Rate Case,* 8 I.C.C. Rep. 214, at p. 271.

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The reasons against allowing Vancouver to have as low a rate as Winnipeg on goods hauled Eastward to the British Columbia interior points as on the same class of goods hauled Westward from Winnipeg are, (1) the cost of construction in the mountains is three times more expensive than on the prairie, and maintenance and operation almost twice as expensive; (2) the trend of freight is Eastward, necessitating the haulage of empty cars from Fort William and East thereof, past the British Columbia interior points to Vancouver; (3) the rates from Vancouver to British Columbia interior points are local rates and non-competitive in character. These rates are not complained of as being excessive or unreasonable in themselves and should only be compared with local rates on United States railways from Pacific Coast cities Eastward to interior points. It has been proved conclusively that these local rates on the Canadian Pacific Railway are lower notwithstanding that there is local competition in the United States, there being two lines of railways and a denser population producing more local traffic which lowers tolls of itself; (4) unless the Canadian Pacific Railway made these low rates from Eastern Canada and the European exporting countries in competition with ocean rates (such competition being distinctly authorized by the Railway Act) and obtained the benefit of the long haul, the result would be that all that freight would be landed at the British Columbia Pacific Coast ports and brought by the short haul to interior points; (5) the rate on the Canadian Pacific railway from Eastern Canada to the West is a competitive rate with railways in the United States, and this fact lowers it; (6) this is an outcry of rival traders, the people have never complained of these rates and it follows that there is no unjust discrimination against localities.

He referred to *Boston Chamber of Commerce* v. *Lake Shore and Michigan Southern Ry. Co.*, 1 I.C.C. Rep. 436, p. 452, as quoted in the Canadian Railway Act (Annotated), p. 500, in support of his argument that there is no unjust discrimination against different localities.

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The natural dividing line is a theory, but does work out in practice, because the jobbers in Seattle and Vancouver do not job back to the interior or dividing line points, freight obtained from the East, they come East to these points with the natural products of the coast, and tea, or some such commodity imported by water.

Martin, K.C., in reply contended that the question of where the goods originally came from has nothing to do with the question whether the rates fixed between Calgary and Vancouver on the one hand, and Calgary and Winnipeg on the other, do or do not unjustly discriminate against Vancouver, but the question is whether the rate between Winnipeg and Calgary is a fair rate as compared with our rate.

Basing points and railway practice should not be considered by the Board as against the express words of the statute which forbids unjust discrimination and if an advantage exists in favour of Vancouver against Winnipeg they must recognize it and take it into account in fixing the tolls.

Sections 259 and 260 of the Railway Act, 1903, define tariffs, the various kinds and the powers of the Board in relation thereto. By section 252, sub-section 3, a railway company is not allowed, except within very narrow limits to be influenced in making its rates by the competition of other railways and that railway companies have no right to create artificial advantages in favour of any place either in favour of the place or in favour of themselves, and in so doing hurt other places and should be compelled to give to Vancouver as fair a trade rate as to Winnipeg. By reducing the tolls from Vancouver Eastward the consumer would get his goods cheaper, and if Winnipeg is not able to compete, the Board is not bound to fix the rates so that its merchants shall not lose business or to help Canadian manufacturers to hold the Canadian market at the expense of the settlers. It is claimed that if a regular rate is established between Vancouver and Calgary the empty car movement would only be from Winnipeg Westward,

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and not as far East as Fort William, and that the movement of cars loaded with grain and cattle Eastward begins near Moose Jaw, about half the distance between Winnipeg and Calgary.

December 17, 1906.

The Board having reserved judgment directed a further inquiry to be made by the Chief Traffic Officer, Mr. Hardwell, the material portions of his report are as follows:—

That the average train on the Pacific division with a 100% engine would be about 360 tons, or one-half the same engine's load from Winnipeg to Calgary.

That an East-bound train from Vancouver to Calgary has to be raised 5,403 feet more than one travelling from Winnipeg to Calgary.

That on the Crow's Nest line the grades are longer than on the main line.

That it is more expensive to operate than the Prairie line.

That for the shorter trains on the steeper grades the fuel consumed and the number of trainmen are practically the same as for the longer trains on the level and low grades.

That the cost of maintenance of way on the Pacific division is very close to double the cost of the Prairie divisions.

That the expenditures for dealing with snow are greater on the Pacific division than on any other part of the system.

That "One snow slide on the Pacific division is more costly than a month's work elsewhere."

That more men are required per mile in the mountain districts in looking after the tracks, slides, snow sheds and tunnels, than on level track where there are no sheds and no slides.

That owing to the grades the track sections in the mountains are limited to five miles in length; East of the mountains the sections are from 6 to 7 miles long, but the same number of men is required on the shorter mountain sections as on the larger ones on the plains.

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That on the Pacific division the company maintains at terminal points, at a continuous wage, large gangs of men during the winter to be called upon in emergencies in addition to the regular force of trackmen and watchmen, and that such extra force is not required on the Prairie divisions.

That the trackmen West of the Crow's Nest are paid $1.50, East of the Crow's Nest, $1.40 a day.

The report contained the following recommendations:—

In my judgment any order that may issue should make no direct reference which might be construed as an official endorsement of the relative values assigned by the company to the sections of the Pacific division as multiples of the Prairie mileages.

To sum up, I would advise,—

(*a*) That with regard to its freight rates the company's line between Vancouver, B.C., and Calgary, Alta., be placed in the relative position with respect to its line between Winnipeg and Calgary that existed immediately prior to the passage of the Act, 60 & 61 Vict. ch. 5, commonly known as the "Crow's Nest Pass Agreement."

(*b*) That the freight rates on the company's line between Revelstoke, B.C., and Macleod, Alta., bear the same relation to the rates of its line between Winnipeg and Calgary as do the rates of its line between Vancouver and Calgary aforesaid, having regard to the Order of the Board No. 1947, dated November 9th, 1906, in the matter of the application of the Board of Trade of Kaslo, B.C.; that for this purpose the line between Yale, B.C., and Macleod via Arrowhead and Kootenay Landing, be considered as one section, and the maximum mileage that via Calgary wherever the distance via Calgary is less than via Kootenay Landing.

(*c*) That commodity rates be established from Vancouver to Calgary, and Macleod, and intermediate points on the same articles as have been accorded commodity rates from Winnipeg under the aforesaid Crow's Nest Pass Agreement, and that such rates be calculated in accordance with clauses "a" and "b."

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(*d*) That to points between Vancouver and Calgary and Macleod and in the Kootenays, on commodities from the East, carried all-rail under transcontinental rates, no rates be made lower than the sum of Eastern rates to Vancouver and the rates from Vancouver to the destinations.

My sympathies are with the Coast merchants who are restricted to the very limited markets of British Columbia, as, geographically, I look upon the Calgary and Edmonton road as the national (natural) dividing line. The evidence, submitted, however, is against it; yet, if my views are approved, the Coast shippers will have much more favourable rates than heretofore.

I am afraid I have not made all the points I have attempted so clear as should be the case; but it has been a very difficult subject to handle and has involved investigation and calculation to an unusual extent.

Copies of this report were sent to the parties interested, and written arguments were thereupon sent in to the Board of which the following is a summary:—

E. W. Beatty, for the Canadian Pacific Railway Company:—The sympathy felt by the Chief Traffic Officer for the Vancouver merchants cannot be a material factor or a circumstance to be considered in determining the merits of this complaint. The complaint must be dealt with upon its merits.

There is no such thing as a natural or national dividing line where rates meet. This is due largely to chance and not in any respect to the geographical situation of inland points. It is admitted that the dividing line in the present case compares favourably with that of the Great Northern and Northern Pacific lines south of the international boundary because of greater productivity, population and lesser cost of operation in the territory traversed.

The evidence shews that the cost of operation, maintenance and construction of the Pacific division is twice as great in regard to the first two and exceeded by an enormous amount in

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regard to the last as compared with the Prairie divisions. It also shews with the empty car movement Westward, and the sparsely settled territory through which the mountain divisions run that the rates from Vancouver Eastward are relatively not as high as from Winnipeg Westward.

The main contention of the complainants is that the rates are discriminatory and not unreasonable, but the Chief Traffic Officer while finding that discrimination has not been proven, recommends changes which were not asked.

The rates imposed by the Crow's Nest Pass Act cannot be referred to in this complaint or used as a basis for a reduction of the local rates from Vancouver.

We rely upon the findings in the first part of the Chief Traffic Officer's report and his candid admission *that his recommendations are contrary to the evidence.*

J. S. Ewart, K.C., for the Winnipeg and Calgary Boards of Trade, relied upon the findings in the Chief Traffic Officer's report and the reply of the railway company.

He directed his argument principally to the discussion of return loads or empty car movement, competitive or basing and non-competitive points, natural advantages, derived from geographical position, differentials, public interest and the effect which these have on through and local rates.

A large number of empty cars have to be hauled to the Coast points to be returned loaded, thus it will be seen that this increased cost of haulage must raise the rates Eastward, and if the contention of the applicants is granted this state of affairs would be aggravated, citing *New Orleans Cotton Export* v. *Illinois Central Ry. Co.,* 3 I.C.C. Rep. 534; *James & Abbott* v. *East Tennessee, Virginia & Georgia Ry. Co.,* 3 I.C.C. Rep. 225; *Lehmann, Higginson & Co,* 4 I.C.C. Rep. 1; *F. Shumacher Milling Co.* v. *Chicago, Rock Island & Pacific Ry. Co.,* 6 I.C.C. Rep. 61; *Weil* v. *Pennsylvania Ry. Co.,* 11 I.C.C. Rep. 627; *A. J. Phillips Co.* v. *Grand Trunk Western Ry. Co.,* 11 I.C.C. Rep.

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659; *Menasha Woodenware Co.* v. *Atchison, Topeka and Santa Fe Ry. Co.*, 11 I.C.C. Rep. 666; *Burton Stock Car Co.* v. *Chicago, Burlington & Quincy Ry. Co.*, 1 I.C.C. Rep. 132.

The rates are so arranged to enable Winnipeg to compete with Montreal, Toronto and other Eastern cities, on the one hand, and with Brandon, Calgary and other Western cities on the other, and by reducing the rates from Vancouver Eastward, all the other competing points would suffer against which the Pacific Coast points make no complaint as to tolls.

Vancouver must be treated as a highly competitive point and rates fixed accordingly, not because of any special natural advantages, but because ships and railways go there, but it would be unfair for Vancouver to ask that the rate direct from say Montreal and Toronto via Winnipeg to Calgary should be equal to the rate via Vancouver to the same point, a longer distance, and how can it be unjust discrimination to enable Winnipeg by local rates to do business in a territory 1,280 miles closer to itself. The rule is found in *Interstate Commerce Commission* v. *Louisville & Nashville R.W. Co.*, 190 U.S.R. 273. It has been properly held that "the competition necessary to produce a dissimilarity of conditions must be real and controlling and not merely conjectural or possible." In other words, the Board would sanction the lower rate for the longer haul where competition rendered that expedient, but it would not sanction it *for purposes other than those necessitated by competition.* Natural advantages are wholly negligible until they produce competition and carriers regard the competition itself, not what produced it.

Ex-European exports have a choice between (1) shipping to Vancouver, and thence Canadian Pacific Railway Co. to Alberta. (2) shipping to New York thence rail to Brandon by United States railway and thence Canadian Pacific Railway Co. to Alberta; and (3) shipping to Montreal, and thence Canadian Pacific Railway Co. to Alberta.

Under the above circumstances the Canadian Pacific Railway Co. in dealing with through freight can so arrange its local tariff

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from Vancouver and Brandon so as to secure haulage against its competitors which cannot be called unjust discrimination because, although it would interfere with the "local advantages" of New York and Vancouver it is justified on the ground that "there is competition."

The decision of the Supreme Court of the United States in *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U.S.R. 197, p. 222, supports this contention as follows: "The effort of the Commission by a rigid general order to deprive the inland consumers of the advantage of through rates and to thus give an advantage to the traders and manufacturers of the large sea-board cities seems to create the very mischief which it was one of the objects of the Act to remedy." In the public interest the Canadian Pacific Railway Co. in discriminating against foreign competition secures business for the railway, employment for the people and protection to the industries of the country.

The case of *Cannon Falls* v. *Chicago & Great Western Ry. Co.*, 10 I.C.C. Rep. 658, is an authority for the statement that artificial conditions overcome natural advantages. Differentials are upheld by the decision of the Supreme Court of the United States in *Texas Ry. Co.* v. *Interstate Commerce Commission*, 162 U.S.R. 197, and a differential means that lower freight rates are charged on export or long haul business to Boston, Philadelphia, Montreal, etc., to equalize them with the lower shipping rates from New York to European markets.

The "basing point" or "competitive point" system, by concentrating business at certain large points allows it to be carried more cheaply and at a lower toll than to small intermediate points, thus defeats the natural advantage and by reducing the transportation charges enormously in the zone of those basing or competitive points proves itself to be in the public interest.

The Canadian Act allows only one ground of exemption from the long and short haul clause, namely, "competition." The long and short haul clause of the Canadian Act has this import-

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ant addition "owing to competition" which is not found in the Interstate Commerce Act of the United States, and, therefore, decisions of the Interstate Commerce Commission and the Supreme Court are distinguishable.

The Calgary Board of Trade asks that in the adjustment of rates between Winnipeg and Vancouver it should not be injured, although it may not be hurt by the raising of the Winnipeg rates as it could purchase direct from the Eastern cities, but it objects to the raising of the same, that because of Vancouver's "natural advantages" such action would prevent the establishment of Winnipeg and Calgary as commercial centres, and on that point adopts and repeats the argument of the Winnipeg Board of Trade. Calgary contends that the trade of Alberta belongs to it and does not think that a quarrel between Winnipeg and Vancouver traders as to rates should have the effect of injuring Calgary merchants in the distributing trade of Alberta.

Joseph Martin, K.C., for the appellants:—The report made by Mr. Hardwell fully substantiates the position that Calgary and Fort Macleod respectively should be dividing line points from Winnipeg Westward and from Vancouver Eastward.

While not objecting to the recommendations of the Chief Traffic Officer, the evidence given at the hearing taken together with Mr. Hardwell's report would justify the Board granting our application.

May 25, 1907. THE CHIEF COMMISSIONER:—The Boards of Trade of British Columbia Pacific Coast cities complained to the Board that the railway rates levied on all classes of goods, from Vancouver to points located in British Columbia and the North-West Territories as far East as Calgary, on the main line, and MacLeod, on the Crow's Nest line, were discriminatory as against them as compared with the rates on Westbound traffic from Winnipeg to the same territory.

The rates attacked were those in force on the Canadian Pacific Railway. The complaint was not based on the ground

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that the rates were, in themselves, so excessive as to be unreasonable or unjust, but merely on the ground that undue preference was given to traffic from Winnipeg Westward, as compared with that from the Coast cities Eastward.

It appears that most of the traffic carried Westward from Winnipeg is carried under what are known as "Traders' Tariffs" marked as, "To be used on re-shipment by Winnipeg wholesale houses only to traders doing business at or tributary to stations specified" in the tariffs. Some contest has arisen as to the extent to which those tariffs are used; and the railway company contends that comparison should not be made with them, as the rates are only the balances of through rates from points East of Winnipeg to the Western points in question, after deducting the regular tariff rates to Winnipeg. It appears to me, however, that these questions are quite immaterial. If, by so basing the rates, an unjust preference is given to Winnipeg as against the Pacific points, it is equally as objectionable as if the rates were computed on any other basis, and the comparison should be made with traffic carried for similar parties and under similar conditions, and on other traffic the tariffs applicable thereto are those between which comparison should be made.

The complainants rely mainly on a comparison of the respective distances from Winnipeg and Vancouver, claiming that the levying of higher rates for shorter distances raises a presumption of unjust discrimination. They rely also upon a comparison of the practice upon lines in the United States, claiming that the Westbound rates from St. Paul are equalized with the Eastbound rates from Seattle and Portland at points much farther East than are the rates from Winnipeg with those from Vancouver on the Canadian Pacific Railway.

It appears to me that no inference can be drawn from a mere comparison of distances upon different portions of railways, and that it does not constitute discrimination—much less unjust discrimination—for a railway company to charge

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higher rates for shorter distances over a line having small business or expensive in construction, maintenance, or operation, than over a line having large business or comparatively inexpensive in construction, maintenance, and operation.

In my opinion a party raising such a complaint upon a mere comparison of distances should shew the nature of the particular lines referred to and that there is a material disproportion of rates as against the shorter line after due allowance is made for the circumstances just mentioned.

At the hearing, the complainants offered no evidence upon these points; but the railway company gave some evidence shewing that the cost of maintenance and operation were much greater, and the traffic lighter, upon the Western portion of the line than upon the portion from Winnipeg Westward. While this shewed that some difference in rates, as compared with distances, was reasonable, the information given was not sufficient to form an accurate judgment as to whether, after making due allowance for difference of traffic and expense, the Western rates were unduly high as compared with the others.

As the matter was one of considerable public importance, the Board did not feel warranted in dismissing the complaint on the mere ground that no sufficient proof of discrimination had been given, but directed its Chief Traffic Officer to make further inquiries and afford it all the information possible for the purpose of enabling it to arrive at a correct conclusion. This inquiry has been made, with the result that the figures given by the railway officials have been found to have been, in the main, correct, and that some further information has been procured.

Members of the Board are aware, from personal investigation of the route, that grades are much heavier, and the line much more difficult of operation, in British Columbia than in the prairie provinces, and this view has been clearly established by the evidence.

The original report of the Chief Traffic Officer shewed that, by computations based upon the evidence as to the cost of operation and maintenance upon different sections of the main line of

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the railway, the rates from Vancouver to Calgary were really lower, as compared with those from Winnipeg to Calgary, than if they were based upon the proportionate expense. No accurate data were furnished by the evidence, or by the subsequent reports of the Chief Traffic Officer, for a comparison of the expense of operation and maintenance on what is known as the Crow's Nest route with that for the prairie lines, though the Chief Traffic Officer reported that the Crow's Nest line was much the more expensive to operate. He, however, made some further calculations based on a comparison of grades and the alingment, as a result thereof, to portions of the lines in British Columbia of a constructive mileage at the rate of one and a half miles from Yale to Revelstoke, and two miles from Revelstoke to Canmore, for each actual mile of railway. This estimate was taken from a statement in a letter of Mr. MacInnes, Freight Traffic Manager of the Canadian Pacific Railway Company, that a certain tariff of the company was based upon such constructive mileage. This calculation shewed that, using the constructive mileage thus estimated, the rates from Winnipeg Westward were less per mile than those from Vancouver Eastward. It appears to me that the results of such estimates afford no reliable basis for concluding that the Vancouver Eastward rates are discriminatory as compared with the Winnipeg Westbound rates. The estimates are very loose, and are not based upon any definite calculations. Those based upon actual figures, as to comparative expense of operation and maintenance, are much more reliable, even though, in some respects, details are not fully given. Although the company may in the past, for some purposes, have made use of such estimates, this should not be taken as establishing that the estimates were sufficiently accurate for the purposes of the complaint now in question. It is clear that an absolutely accurate comparison cannot be made, and the evidence does not appear to me sufficiently strong to warrant the conclusion that the Eastbound rates are unduly high as compared with the Westbound ones.

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The report of the Traffic Officer further shews that the rates from Vancouver Eastward are lower than those on the United States lines, and this although the portions of the United States served by these lines are much more productive and thickly settled, and afford greater local traffic, than British Columbia; and, also, that the points at which the Eastbound and Westbound rates meet in the United States are considerably nearer Seattle than is claimed by the complainants; and that, comparing the proportionate distances from Winnipeg and Vancouver respectively with those from St. Paul and Seattle respectively, the average points of meeting of the rates on the Canadian Pacific Railway are as fairly situated as the points on the lines in the United States.

So far as the traffic over the Crow's Nest line is concerned, it would be much more satisfactory if more definite information as to the cost of operation had been procured; but, taking into consideration the respective rates over that line and over the main line via Calgary to MacLeod, and the results of the other inquiries, it does not seem to me sufficiently probable that further inquiry would establish the unfairness of the rates to warrant us in making such inquiry. It must also be remembered that the traffic on the prairie sections of the Canadian Pacific Railway is very much greater than that upon the lines in British Columbia; that the earnings per mile of the company for the prairie lines are very much greater than in British Columbia, and that the company may reasonably be expected to carry the traffic on the prairie lines at lower rates than upon the other lines. At any rate, if it sees fit to do so to a reasonable extent, it cannot well be claimed that this course involves unjust discrimination as against the traffic in and through British Columbia.

There are two minor points which require consideration. One arises under special commodity tariffs for Westbound traffic from Winnipeg upon the classes of articles named in the statute 60-61 Vict. ch. 5, sec. 1 (D.), intituled "An Act to authorize a

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subsidy for a railway through the Crow's Nest Pass." That Act authorized the granting to the Canadian Pacific Railway Company of a subsidy towards the construction of a railway from Lethbridge, through the Crow's Nest Pass, to Nelson, upon certain conditions, one of which was that an agreement should be made between the Government and the Company by which, among other things, a reduction was to be made in the general rates and tolls of the company upon the classes of merchandise therein mentioned Westbound from and including Fort William and all points East of Fort William on the company's railway to all points West of Fort William on the company's main line, or on any line of railway throughout Canada owned or leased by or operated on account of the company.

As a result of this Act and the agreement made under it, the company made tariffs of reduced rates upon the classes of merchandise referred to, not only from Fort William and points East thereof Westward, but also from Winnipeg Westward, without similarly reducing rates on the same classes of merchandise from Pacific points Eastward. These reductions cannot be considered as having been forced upon the company, but were the result of an agreement which it chose to enter into for the purpose of obtaining a subsidy in aid of the construction of a line of railway. The agreement and the statute did not even deal with rates from Winnipeg at all. When the statute was passed, and when the agreement was made, the law prohibited unjust discrimination between localities; and while Parliament did not stipulate for similar reductions over Western portions of the company's railway, it should not, in my opinion, be considered as having authorized what would, if done otherwise, have produced unjust discrimination. I think that we are justified in inferring that, in respect of the classes of merchandise to which these tariffs relate, the reductions did result in such discrimination, and that the rates from Vancouver Eastward, upon similar traffic carried under similar circumstances, should be proportionately reduced.

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The remaining point arises out of the facts that, in order to meet water competition on the Pacific Coast, the railway company carries goods from Eastern points to the Pacific Coast at lower rates than to interior Western points, and that the same practice prevails with reference to the rates from Winnipeg Westward; and that, at many interior points, the rates from Winnipeg are less than the combined rates from Winnipeg to points on the Coast, and from the latter points to the interior ones. The low rates to the Coast are made necessary in order to enable the railway companies to obtain traffic in competition with ocean carriers. Such a practice is distinctly authorized by the Railway Act, and, unless the higher rates from Eastern points to interior Western points are, in themselves, unjust or unreasonable, this practice does not involve unjust discrimination. Necessarily the situation must have a modifying effect upon the rates to the interior points, which must vary with the distances from the Pacific ports. *Primâ facie* the railway company should be entitled to charge reasonable rates from the Pacific ports Eastward, and it should not be obliged to charge, and would not even be warranted in charging, excessive rates to the interior points for the purpose of equalizing the position of the Pacific Coast points. It does not appear to me that the mere fact that the Westbound rates from Winnipeg or any other point to such interior Western point are less than the rates which would be made up by a combination of the rates from such Eastern points to Pacific points, and from the latter to the interior point, in itself, constitutes unjust discrimination or undue preference. The railway company is allowed to meet competition at the coast points, and I think it should equally be allowed to meet the effect of that competition upon interior points to a reasonable extent.

I am of opinion that the complaint should be dismissed, except in so far as relates to the classes of traffic for which reduced rates were given under the Act relating to the Crow's Nest line.

Hon. Mr. Deputy Chief Commissioner Bernier concurred.

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July 6, 1907. MR. COMMISSIONER MILLS:—I regret my inability to concur in the judgment of the Chief Commissioner in this case.

I do not attach so much importance as the Chief Commissioner seems to attach to certain portions of the evidence—evidence into which the element of interest enters largely and there is clear ground for difference of opinion as to its value; and I differ wholly from the opinion expressed as to the bearing of what is called the "constructive mileage" evidence; it has, I would venture to say, a manifestly direct bearing, and is in my opinion the best possible evidence as to the relative cost of the operation and maintenance of the two sections of the railway, the mountain section and the prairie section,—because it is an expression of the deliberate opinion of the railway company, with the facts in its possession, at a time when there was no dispute and no issue to be settled; according to which opinion, each mile of the road between Yale and Revelstoke cost as much to operate and maintain as one and one-half miles of the prairie section, and each mile between Revelstoke and Canmore as much as two miles of the prairie section. The rates were adjusted on this basis and no complaint was made by any section of the country.

At a later date, the rates on the prairie section were reduced, without any corresponding reduction on the British Columbia (including the mountain) section; the balance was thus disturbed, and has remained so, although no evidence was given at the hearing or since to prove that the traffic on the said British Columbia section had then become or now is *relatively* any less than it was when the "constructive mileage" basis was established; and for this reason, as I understand it, the chief traffic officer of the Board used the "constructive mileage" of the company in one of his calculations.

Further, the Chief Traffic Officer, whose technical knowledge and experience specially fit him for dealing with such questions, investigated the points at issue in all their bearings, at great

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length, and with the utmost care; he read and weighed the evidence pro and con; he considered the objections urged by the representatives of the railway company against the statements and recommendations made in his report of the 17th December, 1906; and he came to the conclusion that there has been and is discrimination against the Pacific Coast cities as compared with Winnipeg.

Therefore, without stating my reasons at greater length or further enumerating the portions of the Chief Commissioner's argument and conclusions from which I have to dissent, I would say that I approve of the recommendations of the Chief Traffic Officer, as follows:—

(*a*) That the rates between Vancouver and Calgary should be reduced so as to preserve the same relative proportion between these and those between Winnipeg and Calgary as existed before the latter were reduced some years ago; in other words, that the prairie rates should apply between main line points in British Columbia counting one mile between Yale and Revelstoke as equivalent to one and a half prairie miles, and one mile between Revelstoke and Canmore as equivalent to two prairie miles,—equalizing the Vancouver Eastbound and the Winnipeg Westbound rates at a point 67 miles West of Calgary.

(*b*) That the rates between Revelstoke and MacLeod via Nelson should be similarly reduced, counting each mile between Yale and Crow's Nest as one and a half prairie miles, instead of two miles, as at present.

(*c*) That from Vancouver to Calgary and MacLeod and intermediate points, commodity rates should be given on the same articles as have commodity rates from Winnipeg under the so-called "Crow's Nest Pass Agreement"; these rates to be calculated in the same manner as the class rates, as in sections (*a*) and (*b*),—equalizing the Crow's Nest reduced rates from Vancouver Eastbound and the rates from Winnipeg Westbound at Wardner, 146 miles West of MacLeod.

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FIRE—OPERATION OF RAILWAY—NEGLIGENCE.

CANADA.] [SUPREME COURT.

RED MOUNTAIN R.W. CO. v. BLUE.

(39 *S.C.R.* 390.)

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Operation of railway—Unnecessary combustibles left on right of way—Railway Act, 1903, *secs.* 118(*j*) *and* 239—*R.S.C.* 1906, *ch.* 37, *secs.* 151(*j*) *and* 297—*Damages by fire—Point of origin—Charge by Judge—Finding by jury—New trial—Practice—New evidence on appeal—Supreme Court Act, secs.* 51 *and* 73.

The question for the jury was, whether or not the place of origin of the fire which caused the damages was within the limits of the "right of way" which the defendants were, by the Railway Act, 1903, obliged to keep free from unnecessary combustible matter, and their finding was that it did, but the charge of the Judge was calculated to leave the impression that any space where trees had been cut, under the powers conferred by sec. 118(*j*) of that Act, might be treated as included within the "right of way" and, in effect, made a direction, on issues not raised by the pleadings or at the trial, as to negligent exercise of the privilege conferred by that section.

Held, that, in consequence of the want of more explicit directions to the jury on the question of law and the misdirection as to the issues, the defendants were entitled to a new trial. The Court refused an application by the respondents, on the hearing of the appeal, for leave to supplement the appeal case by production of plans of the right of way which had not been produced at the trial, as being contrary to the established course of the Court.

PRESENT:—Sir Charles Fitzpatrick, C.J., and Davies, Idington, Maclennan and Duff, JJ.

Appeal from the judgment of the Supreme Court of British Columbia, 12 B.C.R. 460, 6 Can. Ry. Cas. 219, affirming the judgment of Morrison, J., at the trial, by which the plaintiff's action was maintained with costs.

The material circumstances of the case are stated in the judgments now reported. October 14, 15, 1907.

A. H. MacNeill, K.C., for the appellants. *Nesbitt*, K.C. and *C. R. Hamilton*, K.C., for the respondents.

November 20, 1907. THE CHIEF JUSTICE:—I concur in the opinion of Mr. Justice Duff, although with some hesitation. I

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wish at the same time to express my regret that it is not possible for us to entertain the application of the respondent to add to the case on appeal a map or plan of the completed railway and of the land taken or obtained for the use thereof, deposited, as alleged, with the Department of Railways and Canals pursuant to the Railway Act of 1888, 51 Vict. ch. 29, sec. 134.

The jurisprudence of the Court is well settled by a long line of decisions that an appeal to the Supreme Court must be decided solely upon the evidence contained in the case certified to the Registrar by the Clerk of the Court appealed from. *Providence Washington Ins. Co.* v. *Gerow,* 14 S.C.R. 731; *Ætna Ins. Co.* v. *Brodie,* Cass. Dig. (2 ed.) 673, Cout. Dig. 1099; *Confederation Life Association* v. *O'Donnell,* 10 S.C.R. 92; *Exchange Bank* v. *Gilman,* 17 S.C.R. 108; *City of Montreal* v. *Hogan,* 31 S.C.R. 1. In the Privy Council, Macqueen's Practice, page 765; *Banco de Portugal* v. *Waddell,* 5 App. Cas. 161.

In addition to the above cases I have had the registrar look up the papers in an unreported decision of the Court in 1893, in a case of *Ross* v. *Ross,* in which I was engaged. This was a petition to the Court asking to have added to the case on appeal four certain deeds which the petitioners claimed they had discovered since the judgment given by the Court of Appeal, and which had, it was claimed, an important bearing upon the matters in controversy. After reserving judgment, the motion having been referred to the full Court by the Honourable Mr. Justice Fournier, to whom the application was first made, the Court, without calling upon counsel to shew cause against the application, refused to make the order asked for.

This jurisprudence is based upon the provisions of section 73 of the Supreme Court Act, which reads in part as follows:

"The appeal shall be upon a case to be stated by the parties, or in the event of difference, to be settled by the Court appealed from or a Judge thereof.

Section 51 of the Act provides that the Supreme Court may "give the judgment and award the process or other proceedings

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which the Court whose decision is appealed against, should have given or awarded." This section contemplates that the case in the Supreme Court shall be the same case as was under consideration in the Court appealed from, for how, otherwise, could this Court reverse the Court below on the ground that it should have given the judgment which is ultimately given by the Supreme Court, when the Court below had not before it the material upon which the judgment of the Supreme Court is founded?

I do not wish to express any opinion as to the bearing the plan might have upon the case; but I wish to express my regret that we have no authority to receive the plan because it is conceivable that, on the statements made by counsel, both parties might be saved the trouble and expense of another trial. This however must be accepted as an expression of opinion personal to myself.

DAVIES, J.:—I agree in the opinion stated by Mr. Justice Duff.

IDINGTON, J.:—I concur in the judgment of my brother Mr. Justice Duff.

As to the motion to admit plans, they could not properly help us here and, therefore, the motion ought not to be acceded to, even if we had the power which, it is said, has been denied. But, upon that question, I express no opinion.

MACLENNAN, J.:—I agree with my brother Mr. Justice Duff.

DUFF, J.:—I find myself after the careful consideration of the whole of this case unable to resist the conclusion that the appellant company is entitled to a new trial.

The plaintiff's claim is a claim for damages caused by a fire which is alleged to have originated on the defendant company's right of way near Rossland, B.C.; and the liability of the defendant company (if any) rests upon this—that the fire in question is attributable to the failure of the company to perform its

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statutory duty to keep its right of way clear of combustible materials.

The enactment imposing this duty R.S. [1906] ch. 37, and see "Railway Act," 1903, sec. 239 (sec. 297 of the "Railway Act") is in the following words:—

"297. The company shall at all times maintain and keep its right of way free from dead or dry grass, weeds and other unnecessary combustible matter."

The plaintiffs alleged in their pleadings and at the trial assumed the burden of proving that the fire had its origin in the ignition of some such combustible material on the defendant company's right of way. In regard to this point the controversy turned upon the question whether or not a place ascertained as the place of origin of the fire, is within the limits of the right of way. This question is obviously in part—in so far, that is to say, as it involves a definition of the term the "right of way" as used in the enactment quoted—a question of law; and upon that the jury were entitled to the guidance of the Court. The learned Judge did not explain to the jury the meaning of this term; but told them that if the defendants felled trees on the land adjoining their line and left them or other materials there in a combustible state that would be evidence of negligence. The defendants had by virtue of the enactment corresponding to section 151 (*j*), Railway Act, 1903, sec. 118(*j*), the right to fell trees standing within 100 feet of either side of their right of way for the protection of their line; and this the jury was told by the learned Judge at the request of the counsel for the defendant company. But the observations of the learned Judge at that point in his charge could, I think, leave in the minds of the jury no room for doubt, that if, in exercising this statutory power the defendants left material which was likely to become and which afterwards became ignited by sparks emitted from their locomotives, that would be evidence of actionable negligence to which they might give effect by a verdict in this action for the plaintiff.

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I should not in the least disagree with this statement of the law; but it had no application to the case which the learned Judge and the jury were engaged in trying. The plaintiff's action is based as I have said upon the allegation that the fire had its commencement in combustible material left by the company (in breach of the statutory duty referred to) within the limits of its right of way; and the issue raised by that allegation was the issue to which the evidence was directed. The defendants were not called upon to meet and made no effort to meet a case of negligent exercise of their powers under section 151(*j*). In effect, therefore, the learned trial Judge left to the jury a case which was not raised by the pleadings and not tried; while upon the real issue of fact upon the determination of which the plaintiff's case rested the jury were not given the necessary assistance to enable them properly to appreciate what the question was which they were called upon to decide.

There was evidence unquestionably from which the jury might have found that the defendant company had cleared a continuous strip of land in which they had placed their road-bed and track; and it would I think have been a proper direction that if the jury found that this strip was occupied or appropriated by the defendant company as its way or part of its way then they should, in the absence of better evidence, for the purposes of this action treat it as included within the limits of the defendant company's right of way within the meaning of the enactment I have quoted. But the defendants were clearly, I think, entitled to have the jury pass upon the question whether in point of fact there was a strip so cleared as to lead to the inference that it was occupied or appropriated as or for the purposes of a way of the company's railway. And it was their clear right also to have the opinion of the jury whether or not, given such a strip, the place where the fire commenced was within it. In effect the jury were directed that if the fire originated in combustible material left by the defendant company in any space cut or slashed by them whether as part of their way or

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otherwise they are in this action responsible for the ensuing damage.

There is it is true in answer to a question put to the jury an express finding that the fire originated within the right of way. But the charge was I think calculated to convey to the minds of the jury the impression that any space so cut or slashed might properly be, for the purpose of arriving at an answer to that question, treated as included within the right of way; and thus the very point which it was essential that they should determine in order intelligently to answer the question—the limit of the right of way in relation to a place where the fire originated—was in effect withdrawn from them. The defendant company was not only entitled to a finding upon that question; it was entitled to such a finding arrived at under a proper direction.

If one could on the evidence as it stands for one's self come to the conclusion that there was a strip of such a character that in the absence of better evidence of the extent of the right of way the defendant company ought to be held to have appropriated it as such, and that the fire originated within that strip, that would, I think, be a sufficient ground for holding that, there being no substantial prejudice to the appellant, a new trial should be refused; but while the first of these questions would to me present no difficulty, I am unable upon this record to reach a satisfactory conclusion, in favour of the plaintiff, on the second. I do not mean to suggest that there is such a lack of evidence as to the exact position of the point of origin of the fire as would have justified the trial Judge withdrawing the case from the jury; but in the evidence disclosed by the record I am not able to find sufficient materials to enable me to reach a conclusion upon it. In these circumstances the defendant company is, I think, entitled to have the issues in the action submitted to another jury.

The appeal should be allowed with costs of the appeal to this

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Court and the full Court. The costs of the abortive trial should abide the event of a new trial.

Appeal allowed with costs.

A. H. MacNeill, for the appellants.

C. R. Hamilton, for the respondents.

Special leave to appeal has been granted by the Privy Council.

FIRES—DAMAGES BY REASON OF RAILWAY.

ONTARIO.] [COURT OF APPEAL.

LUMSDEN ET AL. v. TEMISKAMING AND NORTHERN ONTARIO RAILWAY COMMISSION ET AL.

(15 *O.L.R.* 469.)

Railway—Damages "Sustained by Reason of the Railway"—Timber Cut for Construction—Trespass—Limitation of Actions—Plans not Filed.

The defendants the railway commission were incorporated by 2 Edw. VII. ch. 9 (O.), which provides, by sec. 8, that they shall have in respect of the railway all the powers, rights, remedies, and immunities conferred upon any railway company by the Railway Act of Ontario. The latter Act, R.S.O. 1897, ch. 207, sec. 42, provides that "all actions for indemnity for damages or injury sustained *by reason of the railway*, shall be instituted within six months next after the time of the supposed damage sustained." The defendants (the railway commission and a contractor under them), before the filing of the plans of the railway, and in the course of constructing it, entered upon the timber limits of the plaintiffs and cut timber for construction purposes. These acts ceased much more than six months before the commencement of this action, brought to recover damages for the trespass and for the value of the timber:—

Held, following *McArthur* v. *Northern and Pacific Junction R.W. Co.* (1888-90), 15 O.R. 733, 17 A.R. 86, that the plaintiffs' claim was for damages sustained by reason of the railway, and was barred by the statute; and it made no difference that the commission had not filed the plans of their railway or taken the necessary steps to compensate those whose lands or interests they entered upon or affected.

Judgment of RIDDELL, J., affirmed.

THIS action was brought by Margaret Lumsden, executrix and devisee under the will of Alexander Lumsden, deceased, and John A. Booth, as plaintiffs, against the Temiskaming and Northern Ontario Railway Commission and A. R. Macdonnell, as defendants; and, upon the death of Margaret Lumsden *pendente lite*, was re-

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vived in the name of her executor, John I. MacCraken, and John R. Booth, as plaintiffs, against the same defendants.

The plaintiffs' claim was for damages for trespass by the defendants upon the plaintiffs' timber limits and cutting and conversion of timber thereon.

The action was tried before RIDDELL, J., without a jury, at Ottawa, on the 3rd June, 1907.

G. F. Henderson, for the plaintiffs.

D. E. Thomson, K.C., for the defendants the railway commission.

J. H. Moss, for the defendant Macdonnell.

June 4, 1907. RIDDELL, J.:—Alexander Lumsden was the licensee of certain timber limits under the usual form of timber license issued by the department. The defendants the railway commission were incorporated by 2 Edw. VII. ch. 9 (O.), for the purpose of building a railway through the northern part of this Province. The defendant Macdonnell is a contractor under them. Before the filing of the plans and about June, 1903, the defendants entered upon the timber limits of Lumsden and cut down certain timber —admittedly this was done in the course of constructing the projected railway. These acts continued down to a later period, but ceased much more than six months before the issue of the writ herein. Several defences were urged before me at the trial, but I need consider only one of them.

The Act of incorporation, 2 Edw. VII. ch. 9, provides, sec. 8, that the commission shall have in respect of the railway "all the powers, rights, remedies, and immunities conferred upon any railway company by the Railway Act of Ontario." This Act, R.S.O. 1897, ch. 207, sec. 42, provides that "all actions for indemnity for damages or injury sustained by reason of the railway, shall be instituted within six months next after the time of the supposed damage sustained." The corresponding section of the Dominion Railway Act, R.S.C. 1886, ch. 109, sec. 27, was interpreted by the late Mr. Justice Street (*venerabile nomen*) and

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by the Court of Appeal in *McArthur* v. *Northern and Pacific Junction R.W. Co.* (1888), 15 O.R. 733, (1890), 17 A.R. 86. Mr. Justice Street held that such damages as indemnity is sought for in this action were "sustained by reason of the railway," and his decision was affirmed by the Court of Appeal. It is true that the Court of Appeal was equally divided; but that is immaterial in this Court. An inferior Court must follow the decision unless and until it is overruled by some Court which has power so to do.

"For the purposes of to-day this matter is concluded by authority and such authority is against" the plaintiff: *The Vera Cruz* (*No.* 1) (1884), 9 P.D. 88, at p. 91, *per* Butt, J.

I do not think that Mr. Henderson succeeded in at all distinguishing the facts of this case from those in the *McArthur* case; and, therefore, without expressing any independent opinion of my own, I shall direct judgment to be entered dismissing this action with costs.

The appeal should be direct to the Court of Appeal.

The plaintiffs (by consent of the defendants) appealed direct to the Court of Appeal, and the appeal was heard by Moss, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A., on the 26th November, 1907.

G. F. Henderson, for the plaintiffs. We concede that no action was brought within the six months, but contend that there is a difference in principle between this and the *McArthur* case, and that, if not, that case was wrongly decided. Under the Railway Act the mainly essential preliminaries to the construction of a railway are the filing of plans and the payment of compensation. The special Act creating the defendant commission also provides for the location of the line and approval of plans (sec. 3), and then for the conveyance of a right of way, by order in council (sec. 4), and its registration in the proper office. As already stated, these steps were not taken before the acts of which the plaintiffs complain were committed. In the *McArthur* case the plans had been filed, but no compensation had been paid, the defendants apparently thinking the lands to be wild lands of the Province: *per* Hagarty, C.J.O., 17 A.R. at p. 93. A fair reading of the judgments of

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Hagarty, C.J.O., and Osler, J.A., will shew that they were both influenced by the fact that the plans had been filed, and the provisions of the Railway Act had been thereby brought into force. It is true that both the learned Judges arrive at the conclusion that the Act applies where those constructing the railway have acted in good faith under what they honestly believed to be the powers given them by the statute, but both lay some stress on the fact that the defendants had taken the preliminary steps. The other Judges then of the Court of Appeal were of the opinion that the determination of compensation was a preliminary of equal importance with the filing of the plans, and that both had to be complied with before the defendants could be said to be other than mere trespassers: *Corporation of Parkdale* v. *West*, (1887), 12 App. Cas. 602, 612, 613. Reference also to *North Shore R.W. Co.* v. *McWillie* (1890), 17 S.C.R. 511; *Kearney* v. *Oakes* (1890), 18 S.C.R. 148; *Zimmer* v. *Grand Trunk R.W. Co.* (1892), 19 A.R. 693; *Ryckman* v. *Hamilton, Grimsby, and Beamsville Electric R.W. Co.* (1905), 10 O.L.R. 419. Inasmuch as the defendants did not take the steps necessary under the statute to authorize them to enter upon the lands, they cannot be heard to claim the benefit of the protecting clauses.

D. E. Thomson, K.C., for the defendants the railway commission. By sec. 4 of 2 Edw. VII. ch. 9 (O.) the Lieutenant-Governor in council was authorized to transfer to the commission so much of the ungranted lands of Ontario as should be required for their railway; and by order in council of the 24th January, 1906 (duly registered), a right of way, including a passage through the lands comprised in the plaintiffs' license, was transferred to the commission. By 6 Edw. VII. ch. 12, sec. 2, the order in council was confirmed, and it was declared that it was intended to vest and did vest in the commission, as and from the passing of 2 Edw. VII. ch. 9, the fee simple in the lands described. Under these Acts the commission were entitled to enter upon the lands and construct the railway, and were not at any time trespassers upon the lands, but the lands became and were vested in fee simple in the commission as from the passing of 2 Edw. VII. ch. 9. Even

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if they were trespassers, the action should be brought within the statutory time; but in the construction of the railway and in all matters pertaining thereto the commission represent the Crown, and cannot be held liable as trespassers: *The Queen* v. *MacFarlane* (1882), 7 S.C.R. 216; *The Queen* v. *McLeod* (1883), 8 S.C.R. 1; *Graham* v. *Commissioners for Queen Victoria Niagara Falls Park* (1896), 28 O.R. 1. At the time of the entry upon the lands by the defendants the plaintiffs had no title whatever thereto or to the timber thereon, and were not licensees thereof, there being in fact no license then current. The provisions of the Railway Act of Ontario with reference to filing of plans, advertising the same, and making compensation to owners of land, do not apply to the commission, so far as ungranted lands of Ontario are concerned, nor have they any application to the alleged claim of the plaintiffs as holders of a timber license. We rely on the reasons given for their judgments in the *McArthur* case by the trial Judge (15 O.R. 733), and by the Chief Justice and Osler, J.A., in the Court of Appeal (17 A.R. 86); the reasons given for their dissenting judgments by Burton and Maclennan, JJ.A., have no application to the present case. It is not the filing of the plans, but the award which gives the right of possession. See *North Shore R.W. Co.* v. *Pion* (1889), 14 App. Cas. 612; *Muskoka Mill and Lumber Co.* v. *McDermott* (1894), 21 A.R. 129.

J. H. Moss, for the defendant Macdonnell. The question is one of fact, and it is clear upon the evidence that the defendants did what is complained of "by reason of the railway." The acts were done in pursuance of the powers conferred by 2 Edw. VII. ch. 9, secs. 3, 8, and 6 Edw. VII. ch. 12, sec. 2.

Henderson, in reply. There is nothing to take the railway commission out of the category of trespassers. The essential preliminaries must be complied with before the right of expropriation can be exercised. As to the position of the commission in regard to the Crown, there is a distinction between cases like the *Graham* case, where no profit was made, and the present case. As to the Act of 1906, that has no more effect than a patent would when issued: *McMullen* v. *Macdonell* (1867), 27 U.C.R. 36.

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December 31, 1907. Moss, C.J.O.:—Counsel for the plaintiff conceded that unless he could successfully distinguish this case from *McArthur* v. *Northern and Pacific Junction R.W. Co.*, 17 A.R. 86, the appeal must fail. I think he has not succeeded in differing the cases. Reference to the *McArthur* case and the decisions referred to, more especially in the judgment of Osler, J.A., shew that while the non-compliance with the requirements as to plans and other preliminaries might operate to prevent the defendants from contending in an action brought against them that they were not trespassers, the provisions as to limitation of time within which the action is to be brought apply equally as in other cases.

The appeal should be dismissed.

OSLER, J.A.:—The action was brought by the licensees of a timber limit on the Montreal river, in the district of Nipissing, against the defendants for entering upon their limit and unlawfully cutting and removing standing timber and trees thereon.

The defendants pleaded the incorporation of the defendant railway commission under 2 Edw. VII. ch. 9 (O.), and the authority thereby conferred upon them to construct a railway between the town of North Bay and Lake Temiskaming, with all the rights, powers, remedies, and immunities conferred upon any railway company under the Railway Act of Ontario, R.S.O. 1897, ch. 207; that the acts complained of, if done at all, were done in pursuance of the powers conferred upon them by these statutes, and not in trespass as alleged. They also pleaded "not guilty by statute," referring to sec. 8 of the special Act and (*inter alia*) to the Railway Act of Ontario, R.S.O. 1897, ch. 207, sec. 42, which enacts that "all actions for indemnity for damages or injury sustained by reason of the railway, shall be instituted within six months next after the time of the supposed damage sustained, or if there be continuation of damage, then within six months next after the doing or committing such damage ceases, and not afterwards; and the defendants may plead not guilty by statute and give this Act and the special Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pur-

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suance of and by authority of this Act and the special Act," as a defence to such an action as the present.

The trespass complained of consisted in the cutting and removing, in the course of and for the purpose of constructing the railway line of the defendant company, timber on the plaintiffs' limits through which the line ran. The work was completed before the 5th August, 1904, and the writ in the present action was not issued until the 4th May, 1906, or nearly two years afterwards. At the trial, Riddell, J., held that he was bound by the decision of this Court in the case of *McArthur* v. *Northern and Pacific Junction R.W. Co.*, 17 A.R. 86, to hold that the limitation section referred to was a complete defence, and he accordingly dismissed the action.

From that judgment the present appeal is brought.

I am of opinion that the learned trial Judge was right, and that, under the circumstances, no other course was open to him than to follow, as we ought also to do, the decision in the *McArthur* case, leaving it to be reconsidered or distinguished by a higher tribunal.

Mr. Henderson endeavoured to distinguish it, on the ground that the defendants in the case at bar had not filed the plans of their railway or taken the necessary steps to compensate those whose lands or interests they entered upon or affected, and were, therefore, bare trespassers who were not entitled to assert that the damage caused by their acts was damage sustained by reason of the railway or done in pursuance of the special Act or other Acts, within the meaning of the limitation clause. In the *McArthur* case, no doubt, the plans had been filed, but, by reason of the omission of other essential preliminaries to the rightful exercise of their statutory powers, the defendants were none the less trespassers upon the plaintiff's property. The prevailing opinions do not turn upon the fact that the plans had been filed, it was merely a circumstance which tended to shew that the trespasses had been committed in the execution of the railway works. I am unable to see any substantial distinction in this respect between the two cases, and we are bound by the decision of the point involved,

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though it was the result of an equal division of opinion between the Judges who then constituted the Court. Here it is quite as evident as it was there that it was under the professed authority of the defendants' special Act and other Acts applicable to them, and in the *bonâ fide* exercise of the power conferred upon them to build the railway, that the railway was built and the wrongful acts were done, and that the land through the plaintiffs' limits was taken and cleared for that purpose, and for no other. In that case, after referring to the authorities, it was said that the rule derivable from them appeared to be that in considering the question whether the act complained of was done in pursuance of or under the authority of the Act, the question of *bona fides* largely depended upon the capacity in which and the purpose for which the work had been done by the defendants, that is to say, whether it had been really done in the corporate capacity of and for the purposes of the company or in the course of its business and in promotion of the contemplated works. I refer to the opinion of Hagarty, C.J.O., in that case, and, though of course not as authority, to my own, for a statement of the reasons and decisions which led us to the conclusions we then expressed, which are, I consider, applicable to and must control our judgment in the present case. I refer also to *Ryckman* v. *Hamilton, Grimsby, and Beamsville Electric R.W. Co.*, 10 O.L.R. 419 (C.A.)

Other difficulties exist in the way of the plaintiffs' right to recover which it is unnecessary to examine, as, for the reasons already given, the appeal must be dismissed with costs.

MEREDITH, J.A.:—I am quite unable to perceive how it could rightly be considered that damages caused, or injury done, for the very purpose, and in the very act, of making the railway, in good faith under the Act, are or is not, conversely, "damages or injury sustained by reason of the railway;" nor can I understand how they can be any the less such damages or injury because the railway company have not taken the necessary steps to make their act lawful, and to take the claim out of the category of one for damages, and convert it into one for compensation, under the legislation,

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contained in the Act, requiring compensation to be paid for the loss sustained by the legalised act, and also providing a special mode, not by action, of fixing such compensation.

GARROW and MACLAREN, JJ.A., also concurred.

CONSTITUTIONAL LAW—FIRES—SPECIAL LEGISLATION.

BRITISH COLUMBIA.] [FULL COURT.

NORTHERN COUNTIES INVESTMENT TRUST v. CANADIAN PACIFIC R.W. Co.

(13 *B.C.R.* 130).

Railways—General and special legislation affecting—Dominion and Provincial—Negligence—Damages caused by sparks from engine—Limitation of action for damages—"By reason of the construction and operation of the railway"—Consolidated Railway Act, 1879 (*Dominion*), *Railway Act*, 1903 (*Dominion*)—*Canadian Pacific Railway Company's charter—Interpretation Act, R.S.C.* 1906, *ch.* 1.

In an action for damages caused by sparks from a railway engine, the railway company claimed the benefit of section 27 of the Consolidated Railway Act, 1879, which was incorporated into their charter by Parliament. Said section 27 provides, in part, that all suits for indemnity for any damage or injury sustained by reason of the railway shall be instituted within six months next after the time of such supposed damage sustained:—

Held, on appeal, per Hunter, C.J., and Clement, J., that by virtue of section 20 of the Interpretation Act (Dominion), the Railway Act, 1903, applies to the Canadian Pacific Railway.

Per Irving, J.:—The general Railway Act of 1879, notwithstanding its repeal by subsequent general legislation, governs the Canadian Pacific Railway.

APPEAL from the judgment of Martin, J., in an action tried before him and a special jury at Vancouver on the 25th, 26th and 27th of October, 1906.

At the trial, evidence was given on behalf of the plaintiffs to the effect that the defendants' engine running along the

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right of way of the defendants, caused sparks to fall to the said right of way; that the said engine, by reason of the negligence of the defendants was defective and out of repair, by reason of which it threw sparks to a greater extent than an engine properly constructed would do; and that the railway lands upon which the said engine was running had dry grass and weeds lying thereon, on which the fire caught and from which it was communicated to the plaintiffs' lands adjoining the right of way.

On the evidence a verdict in favour of the plaintiffs for $2,500 was given by the jury.

Martin, K.C., and *Craig*, for plaintiffs.

C. B. MacNeill, K.C., and *McMullen*, for defendant company.

November 21, 1906. MARTIN, J.:—The motion for judgment on the verdict of the jury is opposed on the ground that the action is barred because it was not brought within six months as required by section 27 of the Consolidated Railway Act of 1879, which the defendants claim the benefit of. The negligence found consisted in allowing an accumulation of inflammable material on the right of way and the user of a defective engine, resulting in a fire spreading from the right of way to plaintiffs' property.

The first point raised is as to whether or not, apart from the question of limitation of action hereinafter dealt with, this damage comes within the expression "by reason of the railway," used in said section. In my opinion it does, quite irrespective of the reasoning in *McCallum* v. *Grand Trunk R.W. Co.* (1871), 31 U.C.Q.B. 527, which, however, I shall follow, if I am not prevented by any decision to the contrary which is binding on me. It is contended that the case of *North Shore R.W. Co.* v. *McWillie* (1890), 17 S.C.R. 511, is such a decision, and in support of this view, *Ryckman* v. *Hamilton, Grimsby and Beamsville Electric R.W. Co.* (1905), 10 O.L.R. 419, is cited. But it clearly appears at pp. 430-1 of that report that the Ontario

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Court of Appeal did not regard the judgment of Mr. Justice Gwynne as binding, because, as the other Judges in it say, the question before them was one of fact purely; hence the remarks of the said learned Judge amount only to an *obiter dictum*.

Then as to the second point. Before the defendant company obtained its charter by ch. 1 of 44 Vict. (1881), certain provisions of the Consolidated Railway Act (1879), including the section in question, were by section 2, sub-section 2, declared to be applicable "to every railway constructed or to be constructed under the authority of any Act passed by the Parliament of Canada, and shall, so far as they are applicable to the undertaking, and unless they are expressly varied or excepted by the Special Act, be incorporated with the Special Act, form part thereof, and be construed therewith as forming one Act."

When the company subsequently got its charter this section was substantially inserted in the incorporating Act as No. 17 as follows:—

"The Consolidated Railway Act, 1879, in so far as the provisions of the same are applicable to the undertaking authorized by this charter, and in so far as they are not inconsistent with or contrary to the provisions hereof, and save and except as hereinbefore provided, is hereby incorporated herewith."

One of the provisions then incorporated into the defendants' charter was section 27 above considered, which limited the time to six months within which an action of this kind could be brought. There has been no change in this respect in the company's charter, but the general Act has been amended, first, it is said, in 1888, ch. 29, sec. 287, so as to extend said time to one year, and the provision now stands as section 242 of the Railway Act, 1903.

It is contended by the defendant company that the amendment to the general Act has not altered its special Act and reliance is placed upon the remarks of Lord Justice Brett in *Clarke* v. *Bradlaugh* (1881), 8 Q.B.D. 63, at p. 69, wherein he says:—

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"But there is a rule of construction that, where a statute is incorporated by reference into a second statute, the repeal of the first statute by a third does not affect a second."

And though there has been no decision in this country expressly on the point, yet it is pointed out that in *Zimmer* v. *Grand Trunk R.W. Co.* (1892), 21 O.R. 628, Mr. Justice Robertson, at p. 632, stated, in considering a similar argument, "As a general rule I think this contention must be upheld," and though there was an appeal (19 A.R. 693), yet that point did not come up for consideration and so his view still stands. In the recent case of *Headland* v. *Coster* (1905), 1 K.B. 219, the Master of the Rolls, at p. 227, cites the language of Lord Selborne in *Seward* v. *"Vera Cruz"* (1884), 10 App. Cas. 59 at p. 68, which tends to support the defendants' contention though the remarks were primarily directed to repeal by implication. He said:—

"Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of such general words without any indication of a particular intention to do so."

Mr. Davis argues that the very fact that section 17 was inserted in the charter, though it already existed substantially in the general Railway Act, is an indication of an intention to preserve special rights and, having regard to the special nature of the company's undertaking, in my opinion the contention is at least plausible, even though, as Mr. Martin points out, difficulty may be experienced in its full application to other sections in the Act of 1879 and their amendments. The result is that the plaintiffs' motion for judgment must be refused and judgment will go on the cross-motion of the defendants, dismissing the action.

It seems unfortunate that this strictly legal point could not have been raised and decided at an early stage in the action

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thereby saving much expense, and I was almost tempted to say that I gave effect to such a defence with some reluctance (if a Judge is permitted to have any in the discharge of his duty) when I noticed that in a case of this same nature, *McCallum* v. *Grand Trunk R.W. Co., supra,* Chief Justice Hagarty said (pp. 533-4) :—

"I think it a most sensible provision that requires all such suits to be brought within six months."

The appeal was argued at Victoria on the 4th of June, 1907, before Hunter, C.J., Irving and Clement, J.J.

Maclean, K.C., D.A.-G., on the point of constitutional law involved: There is nothing exempting the Railway Company from liability to the general law for damages. By this limitation provision Parliament has restricted the right of the public in coming to the Court for redress. The railway company should not have any law peculiar or different from any other person or body. The question involved here is not one incidental to the construction or operation of the railway.

Martin, K.C., for the appellant company (plaintiffs): Assuming that it is within the power of the Dominion to enact this limitation section, the cause of action, not being incidental to the construction and operation of the railway, does not come within it. The mere leaving of dry grass on the right of way is sufficient: *Grand Trunk R.W. Co. of Canada* v. *Rainville* (1898), 29 S.C.R. 201; see also *North Shore R.W. Co.* v. *McWillie* (1890), 17 S.C.R. 511, at p. 514.

(HUNTER, C.J.:—That decision was on the language "by reason of the railway;" this is "by reason of the construction and operation of the railway.")

It makes no difference. "By reason of the railway" means "by reason of the construction and operation of the railway": see *Roberts* v. *Great Western R.W. Co.* (1856), 13 U.C.Q.B. 615; *Follis* v. *The Port Hope, etc., R.W. Co.* (1859), 9 U.C.C.P. 50; *Auger* v. *Ontario, Simcoe & Huron R.W. Co., ib.* 164; *Prender-*

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gast v. *Grand Trunk R.W. Co.* (1866), 25 U.C.Q.B. 193; *Anderson* v. *Canadian Pacific R.W. Co.* (1889), 17 O.R. 747, at p. 756; *Browne* v. *Brockville and Ottawa R.W. Co.* (1860), 20 U.C.Q.B. 202; *Brown et al.* v. *Grand Trunk R.W. Co.* (1865), 24 U.C. Q.B. 350; *McCallum* v. *Grand Trunk R.W. Co.* (1870), 30 U.C. Q.B. 122; *Kelly* v. *Ottawa Street R.W. Co.* (1879), 3 A.R. 616; *Conger* v. *Grand Trunk R.W. Co.* (1887), 13 O.R. 160; *Carty* v. *City of London* (1889), 18 O.R. 122; *McArthur* v. *Northern & Pacific Junction R.W. Co.* (1890), 17 A.R. 86; *Sayers* v. *British Columbia Electric R.W. Co.*(1906), 12 B.C.R. 102; *Ryckman* v. *Hamilton, Grimsby and Beamsville Electric R.W. Co.* (1905), 10 O.L.R. 419, at p. 427; *May* v. *Ontario and Quebec R.W. Co.* (1885), 10 O.R. 70; *Carpue* v. *London R.W. Co.* (1844), 5 Q.B. 747; *Palmer* v. *Grand Junction R.W. Co.* (1839), 4 M. & W. 749, at p. 767.

This railway company is bound by the Dominion Railway Act at present in force, that of 1903. The effect of the judgment is that all railways will be subject to the state of the law under which they were incorporated. It cannot be considered possible that the whole scheme of railway legislation is changed with respect to this particular railway. Had Parliament intended that the Canadian Pacific Railway should not be subject to the Railway Commission, there would have been a special clause in the 1903 Act exempting the company. He also referred to *Fensom* v. *Canadian Pacific R.W. Co.* (1904), 8 O.L.R. 688.

Davis, K.C. (McMullen, with him), for respondent railway company (defendants): The Dominion Government has full and absolute control of Dominion Railways, and Parliament can, if it choose, legislate that no action whatever shall be brought against a Dominion railway: see *Levesque* v. *New Brunswick R.W. Co.* (1889), 29 N.B.R. 588. There is a limitation of time for bringing actions against railways in England.

The language "by reason of the railway" has been held by the Judges in Ontario to bear the same meaning at that used in the English Acts, *i.e.*, acts done in pursuance of the powers con-

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ferred by the statute. It is settled law in Ontario that the phrase "by reason of the railway," applies to a case like the one at bar; it is settled in New Brunswick by the *Levesque Case*, and in the Territories by *Walters et al.* v. *Canadian Pacific R.W. Co.* (1887), 1 Terr. L.R. 88. See also *Gaby* v. *Wiltshire Canal Co.* (1815), 3 M. & S. 580; *Kent* v. *Great Western R.W. Co.* (1846), 16 L.J.C.P. 72; *Hammersmith, etc., R.W. Co.* v. *Brand* (1869), L.R. 4 H.L. 171, at p. 196. The following authorities shew that the section does not apply in cases of omission, and that "by reason of the railway" applies to the present case: *Holland* v. *Northwick Highway Board* (1876), 34 L.T.N.S. 137; *Burton* v. *Corporation of Salford* (1883), 11 Q.B.D. 286; *Graham* v. *Mayor, etc., of Newcastle-upon-Tyne* (1893), 1 Q.B. 643; *Blakemore* v. *Glamorganshire Canal Co.* (1829), 3 Y. & J. 60; *Webb* v. *Barton Stoney Creek Road Co.* (1895), 26 O.R. 343.

We do not take the position that the general Railway Act does not apply to the Canadian Pacific Railway Company. That company is in the same position as any other company holding a special charter; that is to say, the general Railway Act applies insofar as it is not changed by the special charter. We say the Railway Act of 1879 was read into the Canadian Pacific Railway Company's charter, and any subsequent change in the general railway legislation, repugnant or contrary to that charter does not apply. The limitation was six months in the 1879 Act, which was read into our charter; it is now twelve months. The latter does not apply to us. See both the contract and the statute, section 21. As to the meaning of "incorporate" whether it signifies "printed in," or merely a reference, see *Clarke* v. *Bradlaugh* (1881), 8 Q.B.D. 63 at p. 69; *Gaslight and Coke Co.* v. *Hardy* (1886), 17 Q.B.D. 619, at p. 621; *In re Wood's Estate* (1886), 31 Ch. D. 607, at p. 615.

Martin, in reply.

Cur. adv. vult.

July 12, 1907. HUNTER, C.J., concurred in the reasons for judgment of Clement, J.

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IRVING, J.:— By the first section of the Canadian Pacific Railway Company's Act, 1881 (44 Vict. ch. 1), the contract between the company and the Government of Canada is approved and ratified.

By the second section provision is made for the issue to the promoters of a charter conferring upon them the privileges embodied in the schedule to the said contract, which charter is to have the same force and effect as an Act of Parliament.

By section 22 of the contract it is provided:—

"The Railway Act of 1879, insofar as the provisions of the same are applicable to the undertaking referred to in this contract, and insofar as they are not inconsistent herewith or inconsistent with or contrary to the provisions of the Act of Incorporation to be granted to the company, shall apply to the Canadian Pacific Railway."

By section 4 of the charter it is enacted:—

"All the franchise and powers necessary or useful to the company to enable them to carry out, perform, enforce, use, and avail themselves of, every condition, stipulation, obligation, duty, right, remedy, privilege and advantage agreed upon, contained or described in the said contract, are hereby conferred upon the company. And the enactments of the special provisions hereinafter contained shall not be held to impair or derogate from the generality of the franchise and powers so hereby conferred upon them."

By section 17 of the charter it is enacted:—

"The Consolidated Railway Act, 1879, insofar as the provisions of the same are applicable to the undertaking authorized by this charter, and insofar as they are not inconsistent with or contrary to the provisions hereof, and save and except as hereinafter provided, is hereby incorporated herewith."

As to the words "incorporated with," Lord Esher said in *In re Wood's Estate* (1886), 31 Ch.D. 607, at pp. 615-6:—

"It is to put them into the Act of 1855, just as if they had been written into it for the first time. If a subsequent Act

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brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held is to write those sections into the new Act just as if they had been actually written in it with the pen, or printed in it, and, the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all. For all practical purposes, therefore, those sections of the Act of 1840 are to be dealt with as if they were actually in the Act of 1855."

By the 27th section of the Consolidated Railway Act, 1879, it is enacted:—

"All suits for indemnity for any damage or injury sustained by reason of the railway shall be instituted within six months next after the time of such supposed damage sustained, or if there be continuation of damage, then within six months next after the doing or committing such damage ceases, and not afterwards; and the defendants may plead the general issue, and give this Act and the Special Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by the authority of this Act and the Special Act."

By an Act passed in 1883, 46 Vict. ch. 1, sec. 1, the following alteration in the Interpretation of Statutes was made (possibly to meet the rule of construction referred to by Brett, L.J., in *Clarke* v. *Bradlaugh* (1881), 8 Q.B.D. 63, at p. 69):—

"And where any Act or part of an Act is repealed, and other provisions are substituted by way of amendment, revision or consolidation, any reference in any unrepealed Act, or in any rule, order or regulation made thereunder to such repealed Act or enactment, shall, as regards any subsequent transaction, matter or thing, be held and construed to be a reference to the provisions of the substituted Act or enactment relating to the same subject-matter as such repealed Act or enactment: Provided always, that where there is no provision in the substituted Act or enactment, relating to the same subject-matter, the repealed Act or enactment shall stand good and be read and construed

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as unrepealed, insofar, but insofar only, as may be necessary to support, maintain or give effect to such unrepealed Act, rule, order or regulation."

By (1888) 51 Vict. ch. 29, sec. 287, the period of limitation was altered from six months to one year.

The first question is this: Does the amendment of 1883 (now section 20 of the Interpretation Act, 1906) apply to the Canadian Pacific Railway Company's charter Act of 1881? The first thing that strikes me is that if it does you will have an amendment made in 1883 by statute of a contract made in October, 1880, because it is impossible to hold that the Act of 1883 does amend the Canadian Pacific Railway Company's special charter Act and does not amend the contract. It seems to me that once the fact is stated the answer is clear beyond question.

Without going into the external circumstances of the case as indicated by the preamble to the Canadian Pacific Railway Company's Act of 1881, it is impossible to suppose that the Crown contemplated passing an Act for the alteration of the contract of 1880: see *Garnett* v. *Bradley* (1878), 3 App. Cas. 944, per Blackburn, L.J., at p. 969.

I do not suggest that the Parliament of Canada had not power to do so, but that canon of construction which declares that a statute must not be deemed to take away or extinguish the right of the contracting party, unless it appears by express words or by plain indication that it was the intention of Parliament so to do, is applicable to the amendment of 1883 and the proposed extension of the period of limitation. The constitutional question, in my opinion, is settled by the decision of the Judicial Committee in *Grand Trunk R.W. Co. of Canada* v. *Attorney-General of Canada* (1907), A.C. 65, in favour of the Railway Company notwithstanding that civil rights are to some extent involved.

As to the third point—the limitation clause (section 27) of the Consolidated Railway Act, 1879, relates to "suits for indem-

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nity for any damage or injury sustained by reason of the railway." The question is, is this action within the provisions of section 27? The section being in restraint of a man's common law right, must be strictly construed.

The facts of the case are as follows: (already set out in the statement).

The opinion of Gwynne, J., in *North Shore R.W. Co.* v. *McWillie* (1890), 17 S.C.R. 511, at p. 513, supports the appellant's case, but Mr. Martin frankly admitted that if *Kelly* v. *Ottawa Street R.W. Co.* (1879), 3 A.R. 616, was good law, his case was hopeless. *Kelly* v. *Ottawa Street R.W. Co.* was decided in 1879 by the Court of Appeal in Ontario, on the authority, so far as two of the Judges were concerned, of *Auger* v. *Ontario, Simcoe and Huron R.W. Co.* (1859), 9 U.C.C.P. 164, decided by Draper, C.J., Richards and Hagarty, J.J., and *Browne* v. *Brockville and Ottawa R.W. Co.*, 20 U.C.Q.B. 202, decided in 1860 by the Queen's Bench (Robinson, C.J., McLean and Burns, JJ.) Morrison, J., concurred. He had in 1870, sitting with Adam Wilson, J., delivered a judgment in *McCallum* v. *Grand Trunk R.W. Co.* (1870), 30 U.C.Q.B. 122. That judgment was affirmed on appeal in 1871 by a Court consisting of Draper, C.J., Richards, C.J., Hagarty, C.J., Wilson, J., Mowat, V.-C., Gwynne, J., Galt, J., and Strong, V.-C. A decision by such eminent Judges should, in my opinion, be followed until over-ruled by competent authority. The opinion of Gwynne, J., was not the decision of the Supreme Court, nor was it given after full argument on the point in question.

I think the appeal should be dismissed.

CLEMENT, J.:—The Railway Act, 1903, was the Act in force when the plaintiffs' cause of action arose; and the plaintiff company contends that if there be any statutory limitation of the time within which action should be brought, it is that mentioned in section 242, viz., one year. If that be so, it will not be necessary to consider the other questions argued before us,

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for this action was brought within the year. It was not brought, however, within six months, and the defendant company contends that in their particular case there is a six months' limitation. The contention more fully stated is this: That by section 17, Schedule A. to the defendant company's charter of incorporation (44 Vict. ch. 1), the then general Railway Act (1879) was, with certain exceptions and modifications, incorporated into and still forms part of the defendant company's charter; that one of the such provisions was the section (27) of the Railway Act, 1879, which limited to six months the time within which, as the defendant company contends, such an action as this should be commenced; that, in other words, the subsequent amendment, embodied now in section 242 of the Act of 1903, by which the time limit was extended to one year, does not apply to or affect the defendant company.

It seems to me that section 20 of the Interpretation Act (R.S.C. 1906, ch. 1) is a complete answer to this contention. The section provides—omitting immaterial matter—that "Whenever any Act or enactment is repealed, and other provisions are substituted by way of amendment, revision or consolidation, any reference in any unrepealed Act to such repealed Act or enactment, shall, as regards any subsequent transaction, matter or thing, be held and construed to be a reference to the provisions of the substituted Act or enactment relating to the same subject-matter as such repealed Act or enactment," and it is only "if there is no provision in the substituted Act or enactment relating to the same subject-matter" that the repealed Act is to stand good so as to give due effect to the unrepealed Act. As the word "substituted" is expressly made to cover amendment as well as re-enactment, the section seems to shatter completely the defendant company's position.

It is to be regretted that this section was not brought to the attention of the learned trial Judge, not to ours. While, therefore, the appeal must be allowed, it will be without costs. The plaintiff should get the costs of the action.

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Apart from this express enactment, I should be prepared to hold that the incorporation in the Canadian Pacific Railway Company's Act of the Consolidated Railway Act, 1879 (with certain exceptions, modifications, etc.), was simply a compendious method of saying *ex abundanti cautea*, that as to matters not specially dealt with in the Canadian Pacific Railway Company's Act the company was to be neither an outlaw nor a law unto itself, but was to be subject to the general railway law. If then Parliament in its wisdom should afterwards see fit to change the general law, it would seem most inexplicable that such change, presumably reasonable and proper, should not apply to the defendant company alone of all the railways under federal jurisdiction. In other words, the application to the Canadian Pacific Railway of the Consolidated Railway Act, 1879, was not special legislation within the spirit of the authorities cited on behalf of the defendant company.

Appeal allowed, Irving, J., dissenting.

CONSTITUTIONAL LAW—PRAIRIE FIRES ORDINANCE.

CANADA.] [SUPREME COURT.

CANADIAN PACIFIC R.W. CO. v. THE KING.

(39 *S.C.R.* 476).

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

Present—Sir Charles Fitzpatrick, C.J., and Davies, Idington, Maclennan and Duff, JJ.

Railways—Constitutional law—Legislative jurisdiction—Application of statute—"The Prairie Fires Ordinance"—Con. Ord. N.W.T. (1898) *ch.* 87, *sec.* 2—*N.W.T. Ord.* 1903. *ch.* 25 (1*st sess.*) *and ch.* 30 (2*nd sess.*)—*Works controlled by Parliament—Operation of Dominion railway.*

In so far as they may relate to matters affecting the operation of a railway under the control of the Parliament of Canada, the provisions of sec. 2, sub-secs. (*a*) and (2), of ch. 87, Con. Ord. N.W.T. (1898), as

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amended by the N.W.T. Ordinances, ch. 25 (1st sess.) and ch. 30 (2nd sess.) of 1903, constitute "railway legislation," strictly so-called, and were beyond the competence of the Legislature of the North-West Territories. *The Canadian Pacific Railway Co.* v. *The Municipality of Notre Dame de Bonsecours* (1899), A.C. 367, and *Madden* v. *The Nelson and Fort Sheppard Railway Co.* (1899), A.C. 626, referred to.
The judgments appealed from were reversed, Idington, J., dissenting.

APPEALS from judgments of the Supreme Court of the North-West Territories (reported 6 Can. Ry. Cas. 421), discharging orders *nisi* for writs of certiorari to remove and quash convictions against the railway company for unlawfully kindling prairie fires, at or near Mortlach and Ernfold, respectively, in the Province of Saskatchewan, contrary to the provisions of the Prairie Fire Ordinance as amended.

The principal questions at issue on the appeals were as to the application of the provisions of the Prairie Fires Ordinance, in respect to kindling fires on prairies and the construction of fire-guards, to railways subject to the control of the Parliament of Canada.

October 23, 1907.

Wallace Nesbitt, K.C., and *Beattie*, for the appellants.
Ford, K.C., for the respondent.

December 13, 1907. DUFF, J.:—The subjects of these appeals are judgments of the Supreme Court of the North-West Territories discharging two rules *nisi* for writs of certiorari for the purpose of quashing convictions against the appellant company under section 2 of chapter 87 of the Consolidated Ordinance of those Territories as amended in the year 1903. This section so amended enacts as follows:—

2. Any person who shall either directly or indirectly, personally or through any servant, employee or agent—

(*a*) Kindle a fire and let it run at large on any land not his own property;

shall be guilty of an offence and shall on summary conviction thereof be liable to a penalty of not less than $25 and not more

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than $200 and in addition to such penalty shall be liable to civil action for damages at the suit of any person whose property has been injured or destroyed by any such fire.

(2) If a fire shall be caused by the escape of sparks or any other matter from any engine or other thing it shall be deemed to have been kindled by the person in charge or who should be in charge of such engine or other thing, but such person or his employer shall not be liable to the penalties imposed by this section, if, in the case of stationary engines, the precautions required by section 12 have been complied with and there has been no negligence in any other respect, or in the case of railway or other locomotive engines such engine is equipped with a suitable smoke stack netting and ash pan netting in good repair and kept closed and in proper place and in the case of railway engines where the line of railway passes through prairie country there is maintained for a distance of at least three miles continuously in each direction from the point at which the fire starts on each side of such line of railway and not less than two hundred or more than four hundred feet therefrom a good and sufficient fire-guard of ploughed land not less than sixteen feet in width kept free from weeds and other inflammable matter and the space between such fire-guard and such line of railway is kept burned or otherwise freed from the danger of spreading fire and there has been no negligence in any other respect.

(3) For the purpose of ploughing any fire-guard as in the next preceding sub-section provided and of freeing from inflammable matter the land between such fire-guard and the line of railway any railway company is hereby authorized to enter upon any uncultivated or unoccupied land without incurring any liability therefor provided that no unnecessary damage shall be done.

An objection in the nature of an objection *in limine* which was raised on behalf of the Crown can be more conveniently dealt with after discussing the substantial question presented by the appeal.

That question is, was the Legislature of the North-West Territories competent to pass the enactments of sub-section 2 in so

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far as they relate to fires caused by the escape of sparks from railway locomotives?

It must, I think, be answered in a sense favourable to the contention of the appellant company on the short ground that the enactment of legislation professing to regulate a Dominion railway *quâ* railway is *ultra vires* of a Legislature, whose legislative powers, it is conceded, were not greater than those of a provincial legislature. That such legislation is by the combined effect of sub-section 29, of section 91, and of sub-section 10, of section 92, of the British North America Act, 1867, *ultra vires* of a province is, I conceive, not now open to dispute. In *The Canadian Pacific R.W. Co.* v. *The Municipality of Notre Dame de Bonsecours,* [1899] A.C. 367, at pages 372 and 373, Lord Watson, speaking for the Judicial Committee, used these words:—

"The British North America Act whilst it gives the legislative control of the appellants' railway *quâ* railway to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the province in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the provincial legislature. Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive rights to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company; but it is, *inter alia,* reserved to the provincial Parliament to impose direct taxation upon those portions of it which are within the province, in order to the raising of a revenue for provincial purposes. It was obviously in the contemplation of the Act of 1867 that the "railway legislation," strictly so-called, applicable to those lines which were placed under its charge should belong to the Dominion Parliament. It therefore appears to their Lordships that any attempt by the Legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant company's authorized works would be legislation in excess of its powers.

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The principle thus enunciated was applied by the Judicial Committee in the subsequent cases of *Madden* v. *Nelson and Fort Sheppard R.W. Co.*, [1899] A.C. 626, at page 628.

The real controversy is therefore whether the legislation in question falls within the category of "railway legislation." It is argued that as the aim of the ordinance is not regulation of railways, but the prevention of prairie fires, it cannot justly be described as "railway legislation." Having regard to the immediate purpose and effect of the enactment in question it is, I think, not very profitable to dwell upon the ultimate aim of the legislature in passing it. Obviously those parts of it which especially apply to railways—those that is to say with which we are here concerned—were designed with the object of preventing the spread of fire in consequence of the emission of sparks from locomotive engines. But if the legislature has sought to attain this end by passing measures applicable to Dominion railways, which if effective would in substance be railway legislation, that is plainly in excess of its powers.

It cannot be disputed that the sub-section in question was intended to and does apply to Dominion railways. The legislative authority of the Legislature of the North-West Territories extended to no railways but street railways and tramways, and having regard to the objects of the ordinance, it is plain that scope of the term "railways" as used in it cannot be so narrowed as to exclude railways outside those classes.

What then is it that the legislature has enacted respecting Dominion railways?

The section quoted creates an offence which is made up of two elements; the kindling a fire and the letting it run at large on land not the property of the person kindling it. Whether, to constitute the offence, the kindling must be upon such land is immaterial. It is at all events clear that the offence is constituted if it is upon such land that the kindling and the letting the fire run at large both take place. Then the section proceeds to enact in effect that where a fire is caused by the escape of sparks from

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a locomotive engine on a railway it shall be deemed to be kindled by the person in charge or who should have been in charge of the locomotive; that is to say, by the railway company. The net results of these provisions as they effect a Dominion railway company is, that if by the escape of sparks from a locomotive on its line a fire is caused on land not its own and it allows that fire to run at large upon such land, such a company is guilty of an offence, punishable in the manner prescribed by the ordinance.

It does not appear to be disputed in the judgments in the Court below and it was not disputed on the argument before us, that if the enactment had stopped there it would have been *ultra vires,* as plainly repugnant to Dominion legislation making it lawful for Dominion railway companies to use steam locomotives in operating their railways.

But the ordinance proceeds to provide a possible defence for railway companies; and it declares that no railway company shall, although a fire has been caused by such an escape of sparks be subject to any of the penalties imposed by the section if such company shall shew that the locomotive was supplied with certain specified appliances; that the land adjoining the railway line was protected by fire-guards of a prescribed character on both sides of the line at a prescribed distance from it; and that there was no other negligence.

Now it will not, I suppose, be doubted that in the absence of negligence or breach of specific statutory duty the fact that a fire is caused by the escape of sparks from a locomotive engine in the course of the normal operation of a railway under the authority of Parliament does not render those responsible for the operation of it liable to legal proceedings as for a wrongful or unlawful act.

They are in such circumstances not soliable because they have done nothing wrongful or unlawful; and in the case of a fire so caused occurring upon land which is not their property there can plainly be no duty incumbent upon them to prevent it running at large.

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How then is the position of a Dominion railway company affected by this legislation?

First, however faultless its appliances, however blameless it may be as regards the origin of such a fire the enactment professes to impose upon any such company operating a railway in the North-West Territories the duty of preventing the spread of it—a duty from which as operating its railway under the authority of the law of Canada it is, apart from the enactment, by virtue of that authority exempt; and second, the way of escape from penal consequences of a breach of this duty—the only way under the provisions of the ordinance—is to maintain fire-guards of the character prescribed as adjuncts of its line. It seems to me to be very clear that such legislation is legislation prescribing a regulation respecting the operation of railways; and consequently within Lord Watson's phrase "railway legislation" strictly so called.

The provision relating to appliances for locomotives is, I think, affected by the same vice. But an examination of the subsection in detail is unnecessary. The ordinance authorizes a single defence comprising three elements. It is impossible to eliminate from that defence the requirement relating to the existence of fire-guards without wholly altering the character of the defence and substituting for that authorized by the legislature one which the legislature has not authorized. That is in effect to substitute for the enactment which the legislature has passed something to which it has not given its sanction and to give effect to this latter as the law of the land—not, I think, a course which a court of law can legitimately take.

There remains the objection that the conviction, being *ex facie* a valid conviction under section 2 as it stood before the amendments of 1903, does not at all depend upon sub-section 2 for its legality and cannot, therefore, be held to be invalidated as the result of the conclusion that the provisions of that subsection relating to railways are inoperative.

The objection, I think, fails for several reasons of which it is sufficient to state one only. There is in the conviction an entire

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absence of the particularity which the law requires: *Smith* v. *Moody* (1903), 1 K.B. 56, and, in the absence of some reasonable evidence of an offence of which the appellant company could be legally convicted, ought on this ground alone to be quashed.

It is not suggested and it is plain from the proceedings before the magistrates that it could not with any shew of reason be suggested either that there is any evidence of any offence other than an offence under sub-section 2 or that any change other than a charge under that sub-section was either preferred or tried.

IDINGTON, J. (dissenting):—These are two appeals from the judgments of the Supreme Court of the North-West Territories, dismissing motions to make absolute rules *nisi* for writs of certiorari for the purpose of quashing convictions of the appellants for breaches of the Prairie Fires Ordinance of the said Territories as amended by the addition of sub-section 2, in the first session of 1903, and sub-section 3, in the second session of the same year, and of which the material parts are set out below.

By section 39 of the Supreme Court Act, we are given jurisdiction to hear an appeal from the "judgment in any case of proceedings for or upon a writ of habeas corpus or certiorari, etc., . . . not arising out of a criminal charge." I assume, for the reasons hereafter appearing as incident to the main argument, the nature of these regulations is such that they are not an invasion of the field of criminal law.

The writ of certiorari issues, unless when applied for by the Crown, only in the discretion of the Court. If the writ has been refused in the exercise of the judicial discretion of the Court section 45 of the same Act denies the right of appeal.

If we assume that the judgment was not an exercise of judicial discretion, though it might be said, of necessity to be such, and then proceed to consider the appeal, we are confined to ascertaining whether or not on the law and facts the magistrate had jurisdiction to convict. If *intra vires* legislation has been found side by side with that *ultra vires* and the latter suffice to

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maintain, on the facts, jurisdiction, we cannot because erroneous views were put before the magistrates or the Court below needlessly gave a wrong reason, quash the conviction. This is not the possible case of a magistrate failing to weigh the evidence because of sole reliance on an *ultra vires* provision.

The judgment of the Court below is right (though some reasons may or may not be erroneous) if the magistrates had jurisdiction to try the charge. The case of *The Colonial Bank of Australasia* v. *Willan,* L.R. 5 P.C. 417, has long been the ruling case upon the subject. Assuming the law to be as expressed at pages 442 *et seq.* thereof, or even going so far as in the Ontario cases cited to us, to look at the evidence to find if any, in support of the conviction, we are confined here to very narrow ground.

If we can conclude as a matter of law that a railway company incorporated by the Dominion Parliament, pursuant to the powers about to be referred to, is entirely free from liability to submit to anything a local legislature by its enactments may prohibit, and fix a penalty for breach of, then the objection to the magistrate's jurisdiction, involved in these motions, may be arguable.

The real questions, the appellants desire us to solve may not be involved in this proposition, but they can only be solved in the appellants' favour on this appeal, in case we can so determine.

I propose therefore to consider the case from that fundamental point of view. The ordinances in question are as follows, and the information is laid, and conviction is, under the original section 2, though argument was addressed to us as to the amendments only:—

"2. Any person who shall either directly or indirectly, personally or through any servant, employee or agent—(*a*) kindle a fire and let it run at large on any land not his own property; . . . shall, be guilty of an offence and shall on summary conviction thereof be liable to a penalty of not less than $25 and not more than $200 and in addition to such penalty shall be liable to civil action for damages at the suit of any person whose property has been injured or destroyed by any such fire.

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"(2) If a fire shall be caused by the escape of sparks or any other matter from an engine or other thing it shall be deemed to have been kindled by the person in charge or who should be in charge of such engine or other thing, but such person or his employee shall not be liable to the penalties imposed by this section if in the case of stationary engines the precautions required by section 12 have been complied with and there has been no negligence in any other respect or in the case of railway or other locomotive engines such engine is equipped with a suitable smoke stack netting and ash pan netting in good repair and kept closed and in proper place and in the case of railway engines where the line of railway passes through prairie country there is maintained for a distance of at least three miles continuously in each direction from the point at which the fire starts on each side of such line of railway and not less than two hundred nor more than four hundred feet therefrom a good and sufficient fire-guard of ploughed land not less than sixteen feet in width kept free from weeds and other inflammable matter and the space between such fire-guards and such line of railway is kept burned or otherwise freed from the danger of spreading fire and there has been no negligence in any other respect.

"(3) For the purpose of ploughing any fire-guard as in the next preceding sub-section provided and of freeing from inflammable matter the land between such fire-guard and the line of railway any railway company is hereby authorized to enter upon any uncultivated or unoccupied land without incurring any liability therefor, provided that no unnecessary damage shall be done."

The first question raised by these enactments is as to the power of a local legislature to impose such penalties as are provided for by section 2 as it originally stood.

This power, if it exist, rests upon section 92, sub-section 15, of the British North America Act, 1867, operating within the scope of sub-section 16.

If any thing in the physical condition confined to or peculiar

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to a province constituted any matter of a local nature, within the meaning of this sub-section 16, then the danger from prairie fires, so destructive and so little understood elsewhere in Canada, than in the prairie provinces, surely needs the application of some legal provisions of a local character, to provide and protect against such dangers.

This was not in itself questioned in argument. It was argued, however, in general terms that this legislation was *ultra vires*. In section 2 as it stood originally there would seem to have been, unless (for the present at all events assumed not to be), trenching upon criminal jurisdiction, an unassailable enactment; and the amending sub-sections 2 and 3, if properly applied and limited to such acts and parties as would be amenable to provincial legislation seem equally unassailable.

It was contended, however, that the appellants were, by reason of their incorporation, within the exclusive powers of the Dominion by virtue of sub-section (*a*) of sub-section 10, of section 92, and section 91, sub-section 29 of the said Act; to build and run a line of railway propelled by steam power, freed from any obligation to observe any legislation, on the part of the local legislature, upon the subject of prairie fires.

Is this broad proposition tenable? If not how far is such a railway company free from anything a local legislature can enact.

It cannot disregard any of the license laws of a province, or by-laws of a municipality created by, and so empowered by, a province to pass such by-laws. At least none of such companies have tried to do so, as yet.

Can it disregard so as to endanger the existence of towns or of great cities, the ordinary fire limits by-laws thereof, prohibiting the erection, within such limits, of buildings, of forbidden inflammable materials?

Can it refuse to submit to the inspection by municipal or provincial authorities, acting within the meaning of mere municipal regulations in that regard, of the chimneys in its buildings?

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Can it refuse to conform to the public health requirements demanded by pressing need, to prevent the spread of disease; merely because these requirements have been enacted, as they usually are, by local legislatures or some local body constituted by a local legislature for the purpose?

In a word, can it, in the negligent doing of the work of building and running or both, befoul the streams, pollute the air, endanger life and property and destroy everything in its path, regardless of all those local regulations that bind every person and every other corporate body in a province?

Is it a sufficient plea, in answer to such acts and breaches of local regulations, that it has had conferred upon it by the Dominion the corporate power to build a line of railway?

Could an individual, so empowered, so escape? It is quite competent for the Dominion Parliament to confer upon a single individual the power of building any such railways as in question. What greater rights than anyone else could he have apart from those he might be specifically endowed with, for that purpose. What exemptions from the common burthens can his property, when he has thus acquired it, have, or he from the duties of citizenship, incidental to such ownership, unless such exceptions are expressly given or necessarily incidental to the due exercise of the powers given him?

If a person or corporation so authorized to construct and run a railway can do none of these several, locally forbidden, things, how can he or it set fire by means of improperly running an engine that is built and run, quite regardless of any care in structure or handling, to provide against such escape of fire, and thereby setting of fire, as must inevitably follow its use in such a way?

If he or it run a road in such a manner surely the power the Dominion has conferred has been exceeded.

Can it be said, in the absence of any regulation of the Dominion, express or implied, that one so far exceeding the express powers given and so acting has, in some implied way, the high authority of the Dominion Parliament to sanction such acts?

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In the absence of such sanction how can it be said that such conduct, when carried on within a province, is entirely beyond its legislative control? That without legislative sanction of any sort, such a person or such a corporation, merely by reason of a limited authority given can run riot and do that which no one else can do is rather a broad proposition.

It seems to me, all to resolve itself into a question of the right of the local legislature to enact laws, tending to protect property against the dangers of a local nature, arising from that negligence which the Dominion Parliament never sanctioned nor intended to sanction nor legislated as to.

Can it be said that because the Dominion has entirely omitted (and I think its delegation of power in that regard until acted on leaves it omitted) any provision in the way of regulating such a mode of exercise of power, it has conferred a right to indulge in unqualified recklessness? Or can it be said that though it has not done so, yet there never can be any legislative effort made elsewhere to prevent such wrong?

Must it be taken that the right of action each sufferer may or must as a legal result have for the damages sustained be the only legal remedy against such a state of things?

I think not, and that unquestionably the acts of a local legislature properly providing due and reasonable means for the preservation from fire of property, in the province, are within the scope of sub-section 16, and in the absence of any legislation by the Dominion Parliament, are enforceable to punish offenders, personal or corporate, that may by his or its, *unauthorized acts*, endanger such property.

The negligent setting of fire on the part of a railway run by Dominion authority and *letting it run at large*, which is the gist of the offence, would be in excess of its power and thus unlawful and has not any colour of Dominion sanction.

The accused in order to meet these charges had only to come into Court and say that what was done, and is charged, was done by virtue of this high authority, and acting within it, and prove such fact and claim discharge.

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Do the recognized exceptions of the ordinance prevent that? To my mind clearly not.

The issues raised were much and needlessly obscured by confusing the validity of the legislation itself which may be *intra vires* as to almost every line of it properly applied; with the persons or corporations to which it might be applicable in given circumstances, and the different ways in which they might come within its range so far as to render them respectively amenable to the several provisions.

I think section 2 as it originally stood is quite wide enough, when due regard is had to the word "indirectly" (and so reading it as necessarily including negligently), to cover such an offence as is charged against the appellants herein.

The word "indirectly" can indeed hardly have any meaning here unless so read.

It comes then, thus looked at, to a question of the onus of proof at the trial. Can we say that such onus is by any general principle of law made to rest upon him who accuses a railway company of a breach of law to shew that it was beyond all peradventure of excuse or justification, and anticipate the defence possibly existing under the same or another Act, or must not the matter stand as in all other cases that where men *primâ facie* are made to appear, to have offended against law, they must plead and prove such justification or excuse as law and fact may give.

It seems to me the *primâ facie* case was made when the company's servant in the course of his employment dropped the coal or hot cinders that kindled the fire which was neglected and that by neglect was let run at large on land not the company's own; and it then devolved on the company to excuse or justify.

And I am of opinion that, whilst it may be optional for a Dominion railway company to avail itself of the exculpatory part of the amending sub-sections and the powers given thereby, there is nothing in them commanding this Dominion railway company or any other railway company to rely for its justification or exculpation on these sub-sections or any of them.

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To imply otherwise, as to these sub-sections, is to read into them what is not expressed and what would not be imputed to them if used by a sovereign legislature whose powers were unlimited upon trial of a charge laid thereunder for breach thereof.

Try to frame an indictment on such a supposed fact, and charge that the accused had run an engine without a smoke stack equipped as mentioned; and another count that the company had not constructed fire-guards yet had run engines on its road; and another count combining both such offences.

Could such an indictment escape being quashed as to every count?

Or try an indictment thereon for setting a fire by means of so running an engine without a proper smoke stack and without fire-guard and without other negligence.

The combination would be fatal.

Assuming an indictment on such a statute, maintainable by alleging the substance of the offence, and accompanying that with such a specific act of negligence as the defective smoke stack or want of fire-guard how could it be claimed that in the absence of offence in regard to defective smoke stacks or want of fire-guard, the accusation of some other offence, for some form of negligence, other than and in the absence of either of these, would not lie? Thus we are brought back face to face with and cannot escape the broad question of negligence.

That negligence I find within section 2 remains also within sub-section 2 as well, when as here and thus, the moot questions are eliminated.

A by-law may be attacked by impeaching a conviction thereunder, but because some of its provisions are *ultra vires* that would not render the whole void, or conviction bad, if a severable part applicable to the offence could be upheld.

Revenue laws have been found impracticable of uniform application, when sometimes some persons or things and not others, come within their respective range, as the cases of *Thomson* v. *Advocate General* (1842), 12 Cl. & F. 1; *Black-*

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wood v. *Regina* (1883) 8 App. Cas. 82, and others cited in Hardcastle's chapter on "Territorial Effect of Statutes," illustrate.

In English law we cannot easily find many apt illustrations arising from the need of differentiating in this way so as to apply distributively the words of a statute to meet varying conditions of person or things or places.

Sutherland on Statutory Construction (2 ed.), in chapter 9, on "Statutes void in part" is replete with that class, of American cases, forming partial illustrations and some strikingly in point as at pages 584 *et seq.*

English law when extended to a colony and superseding some local law of the colony no doubt would raise the same sort of question which also must continually arise under the British North America Act, 1867, as interpreted in the case of *Attorney-General for Ontario* v. *Attorney-General for Dominion,* [1896] A.C. 348.

What may be *intra vires* to-day may in its application to or range of objects, be found in whole or in part inoperative to-morrow.

I therefore think even if we assume, without deciding, the smoke stack provision, as an enactment (though merely a superfluous substitution for, and mere repetition of the common law) to be void, and the fire-guard provision to be also void, and thus discarded, that their elimination of law or fact, from the case only renders the case of negligence the clearer.

There are many operations of either a steam railway, or banking, or shipping, or ferries, or *inter urban* and interprovincial or provincial electric tramway companies, as well as use of a smoke stack or engine, by the first, that may render the wrongful setting of fire and its spread an object for local legislation.

In either of the ways I have suggested the ordinance should be read, and treated, unless I can say as I cannot, that there was no evidence of negligence and hence no jurisdiction, the appeal

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should fail. The *"Ernfold" Case* is, I assume, so entirely within this view of negligence that the Court below is unanimous, though, in the way Mr. Justice Wetmore puts it, needlessly resting the onus on the requirements of the ordinance as to smoke stack. The law required independently of this ordinance an engine of the sort in question to have "suitable smoke stack netting and ash pan netting in good repair and in proper place." I hardly see how unauthorized enactments can change the common law so as to entitle a railway company to dispense with a smoke stack. The onus rested upon the company to meet the *primâ facie* case of negligence.

I confess, however, that the want of knowledge of the localities and points referred to in the evidence in this *"Ernfold" Case* renders it to me less clear than it evidently was to those in the court below. I would not, however, interfere as apart from the reason given, resting upon ordinance instead of common law, as to negligence, there seems in substance no ground of complaint.

There seems, at first blush, by reason of the way the matter has been treated, more in the *Mortlach Case*, to reduce it to a question of the right to impose upon a Dominion railway the duty of making fire-guards. But, on the evidence the appellants' servants for twenty minutes or half an hour saw the smoke yet failed to move, until the fire kindled in a neglected spot of dry grass on the right of way had spread for half a mile, on other than the company's land and the terror stricken people had gathered to extinguish it.

Assuming it optional with the company to disregard the provisions for fire-guards, the doing so rendered it all the more incumbent upon it to have the section men on the watch, for the setting of fire which sometimes, it is said, is inevitable with the most carefully constructed and managed engine.

I cannot assent to the suggestion that when fire escapes in such a case and kindles the grass on the company's own ground and spreads therefrom through neglect it cannot be made amen-

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able, in the absence of Dominion legislation, to local legislation, for such neglect.

No attack is made upon the form of conviction, in either case, in the grounds taken by the rule *nisi*, or in argument, and no argument was made on the facts that would enable me to say that the evident negligence was not in either case sufficient in itself, if negligence ever can be the basis of local prohibition in relation to anything a Dominion corporation can do. That it could be so seemed strenuously denied. Indeed that is to my mind the sole issue here.

I am inclined to hold the opinion that some cases have shewn an undesirable tendency on the part of superior Courts, in discharging their duty of keeping, by virtue of the writ of certiorari, magistrates within their jurisdiction to act as an appellate Court.

We ought not, I conceive, to encourage such a tendency.

We ought only to entertain an appeal of this kind upon the plainest error of the Court below, indeed a something clearly indicating usurpation of authority by the magistrate, upheld by the superior Court of a province.

There are or can be brought about, with a little patience, much ampler means of effectively and authoritatively defining the constitutional limitations and provincial legislative authority than lies within the scope afforded for quashing a conviction upon the return of a writ of certiorari. The issue attempted to be raised by the denial of any power of legislative prohibition, by a local legislature, on the subject of negligence that might include what a Dominion company may be guilty of, is far more important than it seems at first sight.

The fire-guard provision, treated as optional, may be of a beneficent nature, especially in view of section 198 of the Railway Act, and not objectional as an attempt at widening the powers of a Dominion corporation to acquire real estate. Possibly, though repudiated in this argument, Dominion companies have the right, in common with others, to avail themselves of

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local regulations to even pull down neighbouring buildings to protect their own from spread of fire.

I refrain from expressing any unnecessary opinions upon these or other points of law presented for solution, further than that which appears in my dissent from the broad proposition I have set forth above and combatted throughout.

I call attention to *The Canada Southern Railway Company* v. *Jackson,* 17 S.C.R. 316, in which this Court upheld the Workmen's Compensation Act of Ontario as binding upon Dominion railway companies as well as other parties in respect of acts of negligence, for which they had not been theretofore made liable.

I have assumed that the exercise of the penalizing power that is given the provinces by the British North America Act, 1867, is applicable, in proper cases to negligence, and that is no greater stretch of authority to apply it to companies deriving their corporate existence from the Dominion Parliament, than to apply the civil remedy acted upon in that case.

The exercise of any such power must not exceed any of the recognized limitations, such as criminal law, or come in conflict with the Dominion legislation properly and authoratively enacted.

The Bonsecours Case (1899), A.C. 367, also lends countenance to this way of looking at the matter.

The Madden Case, [1899] A.C. 626, when the legislation there in question is examined closely, has nothing I can see to do with the matter. It was an attempt to conflict with Dominion legislation and enforce fence building where impliedly, if not expressly, this latter had freed the company from so doing.

The appeals should be dismissed with costs.

Appeals allowed with costs.

J. A. Allan, for the appellants.

Frank Ford, for the respondent.

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HIGHWAY CROSSING—ABSENCE OF APPROVAL.

NORTH-WEST TERRITORIES.] [NEWLANDS, J.

BIRD v. CANADIAN PACIFIC R.W. CO.

(6 *West. L.R.* 393.)

Railway—Injury to Person Crossing Track—Crossing not at Highway and not Sanctioned by Board of Railway Commissioners—Negligence—Non-compliance with secs. 242 and 243 of Railway Act, ch. 37, R.S.C. 1906—Fences at Crossing—Invitation to Public—Costs.

Action for damages for personal injuries sustained by plaintiff owing to the alleged negligence of defendants.

J. F. Frame, Regina, for plaintiff.
J. A. Allan, Regina, for defendants.

July 17th, 1907. NEWLANDS, J.:—On 19th February, 1906, the plaintiff with her son was crossing the defendants' railway at McLean, on a crossing which the company had made across their railway, when the horses became frightened and shied, and the waggon and team fell over the side of the crossing, and the plaintiff was injured, for which injury she claims $5,000 damages. This crossing was not at a public highway. There is a public highway some distance further east, but, because it goes through the yard of the defendants and crosses several tracks, it has never been opened by the defendants, and is not used to any extent by the public. The crossing in question was made by the defendants some time in August, 1905, but it has never been recognized by the municipality of South Qu'Appelle, within which it is situate, as a public highway, the municipality always insisting that a crossing should be made on the public road further east, and at the present time have an application before the Board of Railway Commissioners to compel the defendants to open this road. The crossing now in use on which the accident occurred has not been sanctioned by the Board.

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The negligence on the part of the defendants alleged by the plaintiff is non-compliance with the provisions of secs. 242 and 243 of the Railway Act, ch. 37, R.S.C. 1906. These sections require, amongst other things, that any structure by which any highway is carried over or under any railway shall be so constructed and at all times be so maintained as to afford safe and adequate facilities for all traffic passing over, under, or through such structure, and a good and sufficient fence, at least 4 feet 6 inches in height from the surface of the approach or structure, shall be made on each side of such approach and of the structure connected with it. The crossing in question was not fenced, and the plaintiff contends that it is too narrow to be a safe crossing. These provisions of the Railway Act apply only to a highway crossing the railway track. This crossing was not there previous to the building of the road, but was only made in August, 1905. It is not the continuation of any street or public road, but was made by defendants instead of grading the public road which I have mentioned, across their tracks.

It was held by the Chief Commissioner of the Board of Railway Commissioners in *In re Reid and Canada Atlantic R.W. Co.*, reported in 4 Can. Ry. Cas. 272, "that there is no Court or authority other than this Board which can make it lawful for either the railway company or any other body to construct highways across the line of railway." This decision is one which I think is binding on me, as there is an appeal from the Board on questions of law and on the jurisdiction of the Board to the Supreme Court of Canada only, and until that Court reverses this decision I think I must take it as the correct interpretation of the powers of the Board under the Railway Act. Upon this question I would also refer to *McKay* v. *Grand Trunk R.W. Co.*, 34 S.C.R. 81, and *Grand Trunk R.W. Co.* v. *Perrault*, 36 S.C.R. 671, 5 Can. Ry. Cas. 293.

As I have already stated, the Board has not sanctioned the opening of this crossing, and it is not therefore a highway under the Railway Act, and the defendants would therefore be

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under no obligation to fence it under section 242 of the Railway Act.

The plaintiff further contends that, because the defendants have built this crossing and put up a sign "Railway Crossing," they have invited the public to use it, and therefore must make it safe for such purpose, and that by not doing so they were guilty of negligence. The plaintiff contended that the crossing was not properly constructed and was not wide enough. I think this was not proved; it was, in my opinion, both wide enough and so constructed as to be reasonably safe. She also in her evidence laid stress upon the fact that the approaches to this crossing were not fenced, and that by fencing it the defendants would have made it much safer to use. Is the neglect to fence in this case negligence? The approach to the crossing where the accident happened was about 12 feet wide, and, under ordinary circumstances, could be used with perfect safety, the plaintiff's son, who was driving, having used it previously with safety, and being apparently well acquainted with it. In *Wood* v. *Canadian Pacific R.W. Co.*, 30 S.C.R. 110, the Chief Justice, Sir Henry Strong, at p. 112, said: "It is not, of course, every omission to do something which would have avoided an accident which constitutes negligence in law. In order that a duty should be imposed upon a person the neglect of which constitutes an actionable wrong, it must be apparent that the want of care or attention is reasonably likely to endanger the safety of others. It is not sufficient that the omission did in fact cause an accident, if it was not to some extent obvious that such a consequence was likely to result from it." Can it then be said in the present case that not fencing this approach was so obviously likely to result in danger to persons using it, that it constituted negligence? I do not think it can. The approach had previously been used safely by plaintiff's son and others, and the accident would not have happened when it did if plaintiff's horses had not become frightened and shied, thus throwing the waggon over the side of the approach to the ground below.

The plaintiff, therefore, in my opinion, cannot recover.

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As to the question of costs, I think I should deprive the defendants of them. They had no right to build the crossing where they did without the permission of the Railway Commissioners, and, if that permission had been obtained, they would have to comply with the Railway Act, and fence it, and, as they have not, therefore, performed their duty to the public, I think judgment should be for defendants without costs.

EMPLOYERS' LIABILITY ACT—COMMON EMPLOYMENT.

McMULLIN v. NOVA SCOTIA STEEL AND COAL COMPANY.

(39 *S.C.R.* 593.)

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Present—Sir Charles Fitzpatrick, C.J., and Girouard, Davies, Idington and Duff, JJ.

Negligence—Railway—Breach of statutory duty—Common employment—Nova Scotia Ry. Act, R.S.N.S. (1900), *ch.* 99, *sec.* 251—*Employers' Liability Act—Fatal Injuries Act.*

Section 251 of the Railway Act of Nova Scotia provides that when a train is moving reversely in a city, town or village the company shall station a person on the last car to warn persons standing on or crossing the track, of its approach and provides a penalty for violation of such provision.

Held, that this enactment is for the protection of servants of the company standing on or crossing the track as well as of other persons.

M. was killed by a train, consisting of an engine and coal car, which was moving reversely in North Sydney. No person was stationed on the last car to give warning of its approach and as the bell was encrusted with snow and ice it could not be heard. Evidence was given that on a train of the kind the conductor was supposed to act as brakesman and would have to be on the rear of the coal-car to work the brakes but when the car struck M., who was engaged at the time in keeping the track clear of snow, the conductor was in the cab of the engine.

Held, Idington, J., dissenting, that an absolute duty was cast on the company by the statute to station a person on the last car to warn workmen, as well as other persons, on the track which, under the facts proved, they had neglected to discharge. The defence under the doctrine of common employment was, therefore, not open to them. *Groves* v. *Wimborne*, [1898] 2 Q.B. 402, followed(*a*).

Held, per Idington, J., that the evidence shewed the only failure of the company to comply with the statutory provision to have been through the acts and omissions of the fellow-servants of deceased; that the company, therefore, could not be held liable for the consequences under the Fatal Injuries Act; that it is, therefore, unnecessary to determine the

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applicability of the said section of the Railway Act, as the fellow-servants were guilty of common law negligence which rendered the company liable but only by virtue of and within the limits of the Employers' Liability Act(*a*).

(*a*) These holdings were settled by Davies and Idington, JJ., respectively.

APPEAL from a decision of the Supreme Court of Nova Scotia reversing the judgment at the trial in favour of the plaintiffs.

The facts of the case are sufficiently stated in the above headnote and in the judgments published herewith.

The trial Judge gave judgment for the plaintiffs and assessed the damages at $3,800. The Court *en banc* reversed his judgment and dismissed the action holding that plaintiffs could not recover under the Railway Act, as the negligence causing the accident was that of a fellow servant of the deceased and that the statement of claim did not cover common law negligence. The plaintiffs appealed to this Court.

November 20 and 21, 1907.

Mellish, K.C., for the appellants. An absolute duty in cast upon the company by section 251 of the Railway Act, and they cannot escape liability by transferring to their employees on the train the obligation of performing it. *Curran* v. *Grand Trunk Railway Co.*, 25 A.R. 407; *LeMay* v. *Canadian Pacific Railway Co.*, 17 A.R. 293.

And plaintiffs are entitled to succeed under the Employers' Liability Act, which recognizes Lord Campbell's Act and excludes the doctrine of common employment.

The statement of claim sufficiently sets up this ground of negligence. See Ruegg on Employers' Liability (5th ed.) p. 121 and form at pp. 362-3. And it may be joined with another or an alternative claim. Ruegg, p. 362; *Curran* v. *Grand Trunk Railway Co.*, 25 A.R. 407.

Newcombe, K.C., for the respondents. The deceased was guilty of contributory negligence. He knew that the train

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might be expected at any moment, and the engineer was justified in assuming that he would be on his guard. See *Aerkfetz* v. *Humphreys*, 145 U.S.R. 418; *Crowe* v. *New York Central and Hudson River Railway Co.*, 70 Hun. 37; *Dominion Iron & Steel Co.* v. *Oliver*, 35 S.C.R. 517.

Section 251 of the Railway Act does not apply to the case of a company injuring one of its own employees. See Labatt, Master and Servant, secs. 637-8. Even if it does we can invoke the doctrine of common employment. Labatt, sec. 638. Smith, Master and Servant, ed. 1904, p. 225.

December 13, 1907.

THE CHIEF JUSTICE agreed with Davies, J.

GIROUARD, J., concurred in the judgment allowing the appeal.

DAVIES, J.:—This action was one brought under what is known as Lord Campbell's Act, by the widow and infant children of one John McMullin, an employee of the defendant company, to recover damages arising out of the death of the said employee while engaged at his work on the railway track of the company.

The defendant company owns and operates a railway between their works at Sydney Mines and their shipping piers at North Sydney, N.S., and such railway runs through the town of North Sydney.

The railway being entirely a provincial one is governed as to its construction, management and operation by the provincial statute, R.S.N.S., ch. 99, intituled the Nova Scotia Railway Act.

The 251st section of that Act is as follows:—

"Whenever any train of cars is moving reversely in any city, town or village, the locomotive and tender being in the rear of such train, the company shall station on the last car in the

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train a person who shall warn persons standing on or crossing the track of such railway, of the approach of such engine, tender and train; and for any violation of any of the provisions of this section, or of any of the three sections next preceding, the company shall be liable to a penalty of one hundred dollars."

Section 280 of the same Act is as follows:—

"Every company . . . causing or permitting to be done, any matter, act or thing contrary to the provisions of this chapter . . . or omitting to do any matter, act or thing required to be done on the part of any such company . . . is liable to any person injured thereby for the full amount of damages sustained by such act or omission . . . ."

The main and substantial question raised and argued before us was as to the true construction of section 251.

The trial Judge held that the section did apply to railway servants as well as others not being so, and cast an absolute duty upon the company for damages arising from the non-performance of which the company was liable.

The Supreme Court of Nova Scotia reversed the judgment of the trial Judge, holding that even "assuming the moving of the cars through the town in reverse order, stationing a man on the last car is analogous to and is governed by the same principle as the failure of a defendant to supply some permanent protection to machinery, such as the fence or guard required by statute in such a case as *Groves* v. *Wimborne* (1898), 2 Q.B. 402," still in the case at bar, "all the negligent omissions, including the stationing of a man on the forward car to give the necessary warning, were those of fellow workmen of the deceased, and even if the company would be liable on proof of a system on their part of running their trains without these necessary precautions . . . there is nothing in the least degree approaching the proof that would be required to support such a case."

I am quite unable to agree with the conclusions reached by the Court below, either as to the application of the doctrine of

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"common employment" or as to the proper inferences to be derived from the very meagre evidence given at the trial.

With respect to the proper construction to be given to section 251, I am unable to agree with the contention that the section only applies to persons not railway servants, and, as to them only "while standing on or crossing the track of the railway" *at a highway crossing.*

There does not appear to me to be any justification arising either from the language of the section itself or from its position in the Act and its relation to its context which would justify the Courts in importing such limitations into it. Nothing is said in the section with respect to a "highway crossing." What is said is that "persons standing on or crossing the track of such railway" within the limits of a town, city or village, shall be entitled, so far as trains moving reversely are concerned, to have a certain specified precaution and warning observed. It does seem to be an arbitrary and unreasonable construction to exclude workmen from the benefit of such a prudent and beneficial section as this. In fact, it would seem rather more necessary for the workman's protection than for that of the outside public. Business might occasionally, no doubt, take some of the general public on or across these railway tracks within cities, towns or villages, but, apart from public highways, the presence of any of the general public would be a rare occurrence on these tracks.

On the other hand, the duties of many of the workmen, trackmen, switchmen, etc., require them to be "on or crossing the track" frequently, and it would seem reasonable to conclude that the section was enacted as much, if not more, for their benefit than for the benefit of the small section of the general public who would legally go "on or across the track." Of course, the section is not for the benefit of trespassers and they, I assume, not to be within it.

The section applies in terms to any and all parts of the company's track within the city or town, and I see as little reason

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for excluding from the section the grounds of the company itself within such city as the workmen of the company.

The section is general in its terms. Its object evidently was the protection of "persons on or crossing the track" within the town's limits from the damages arising from a train of cars running reversely, and I entirely fail to find any justification for confining its protection to persons crossing the tracks at a highway and excluding others who legally and properly are on or crossing the track for business or other purposes, even within the company's own grounds, or others who, being the company's workmen, are on or crossing the track in discharge of their duty.

That being so, what are the facts proved here?

The deceased was a switchman and was engaged, at the time of his death, in the midst of a snow storm, in keeping the switch clear of snow and ice. He was run down and killed by a train of cars running reversely. Not a scintilla of evidence is given as to any contributory negligence on his part, and it is admitted that no person was on the last car ahead of the engine to warn persons of its approach. That being so, the statutory duty of the company was violated.

No evidence whatever was called for the company. No attempt to shew that, as a company, it had tried to discharge its duty by "stationing a man on this last car."

The fireman stated:—"We had no book of rules at that time that I know of." And this evidence is neither contradicted nor explained, but we are asked to assume, from a casual statement of the same man, that "the conductor (who as a fact was in the cab), is supposed to be on the car ahead of the engine;" that the conductor's orders and the system under which the railway was operated required him to be there.

I am not able to draw from this casual statement, the conclusion that the company had, in the words of the statute, "stationed a man on the last car on the train." As a fact, no man was so stationed. If the company desired to raise the de-

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fence of common employment, they would be bound, in my judgment, to prove either that the man was stationed there to warn people and by his own carelessness and negligence had failed to do so, or, at least, that it was, by their rules or orders, the duty of some one to have been there to carry out the statutory duty, and that his absence was not in any way owing to their negligence or default, but to the deliberate breach of duty of some workman charged with such duty.

Then, if they desired to rely upon the qualifying words, which Williams, L.J., added to his concurrence with the other members of the Appeal Court in the judgment of *Groves* v. *Wimborne* (1898), 2 Q.B. 402, they would stand in a position at any rate to urge the application of the doctrine so qualified tc the special facts proved.

As for me, I think the law as laid down by the Appeal Court in *Groves* v. *Wimborne* (1898), 2 Q.B. 402, applicable to this case and binding. The section being applicable to the place where the man was killed and to the man, he being within the class of persons intended to be protected, although a workman of the company, there arose under it a statutory obligation imposed upon the company in the interests of the workmen's safety which they failed to discharge and for the consequences of which failure they are liable. Under the facts as proved it was not open to them to invoke the doctrine of common employment, even if such a doctrine could, in any case, be invoked to relieve a company from the consequences following the failure to observe or conform to a statutory obligation towards a party injured.

These conclusions relieve me of any necessity of considering the other branch of the case, namely, the plaintiff's right to recover under the Employers' Liability Act. As nothing was said respecting the amount of the damages awarded by the trial Judge, I have assumed them to be right.

The appeal should be allowed with costs and the judgment of the trial Judge restored.

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IDINGTON, J.:—I agree that this appeal should be allowed but concur in the opinion of the Court below that the action, so far as rested on the Fatal Injuries Act alone, is not maintainable. It needs also the support of the Employers' Liability Act. There was common law negligence, and hence, in my view of the evidence, I cannot find that it is necessary to pass any opinion on the question of the appellants' right to rely only or at all upon the statutory provisions invoked from the Nova Scotia Railway Act. My reason for that is that I infer from the evidence that the men in charge of the train neglected what had been their accustomed observance of the statutory duties, and that I cannot impute the breaches thereof to the respondents, as part of their system, or at all, except through the misconduct of their servants, who were also the fellow servants of the deceased.

The driver of the engine says:—"The conductor was both brakesman and conductor . . . . The brake on the car at that time was on its rear and there is where he would likely be. To the Court.—If it had been a fine day, the brakeman would have been there. He was not there because it was storming too badly." Boutiler says:—"The conductor was in the cab . . . The conductor is supposed to be on the car ahead of the engine . . . .

"A man would require to be on the car to operate its brake on that occasion. There was no man on the car that day up to the time of the accident. If we had a brakesman that day, his position would have been on the coal car. We could only stop the car through stopping the engine. We had no book of rules at that time I knew of." And, in cross-examination:—"It was a shunting engine. At that time the crew usually consisted of three and the conductor handled the brakes."

And, on this occasion, the three men were there, but evidently the conductor-brakesman, though he had only one car to look after, neglected his duty as such. He had died before the trial and hence above only evidence obtainable, of the sphere

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of duties assigned, unless the respondents' manager and secretary had been brought to prove such from by-laws or otherwise expressly. Such, certainly, has not been the practice at trials of this sort and was not, in face of the foregoing evidence, in my opinion, incumbent on the respondents here.

At first, I was disposed to attach some importance to the statement as to want of a book of rules as indicating a neglect of duty on the part of the company. The statement, as appears above, cannot, however, I think, fairly be so read as to imply of necessity that the company never had delivered the men such rules, or given proper instruction or ever sanctioned the neglect of duty such as is apparent on this occasion. Their man was there to comply with the statute as was also the bell, and, even if the statute can be interpreted so as to enure to the benefit of the appellants, it cannot, in this view, get rid, under the circumstances, of the doctrine of common employment.

The action cannot, therefore, in my opinion, be maintained without the support that the Employers' Liability Act gives. It is urged by the respondents that this cannot be given effect to in this action, and so the Court below seems to have assumed and held for reasons I fail to find sufficient.

As to the statement of claim, I see no insuperable difficulty. Paragraph four seems framed as if intended to cover the cases under section three of the Employers' Liability Act, and paragraph five seems framed as if intended to meet the case of an action resting upon a breach or breaches of the statute there invoked, and which might, if the evidence got the case past the difficulty of the common employment doctrine, support an action under the Fatal Injuries Act itself without regard to what precedes.

Such are the cardinal features of this statement of claim. On its face are presented two cases. Then this becomes clearer when we consider the statement of claim in its first three paragraphs and find that it shews the deceased to have been a ser-

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vant of the respondents in the very same service as those whose negligence is complained of in the fourth paragraph.

How could any one read such a statement of claim and not see thus suggested a claim that must rest on the Employers' Liability Act for support?

The pleading, in that regard, is neither lucid nor precise nor concise, but it must mean nothing if it does not point to an intention to found the first part of the statement of claim on that Act. It, indeed, jumbles together the provisions thereof by using, in a very undesirable way, some of the language used in each of the three later sub-sections of section three.

The statement of claim, as a whole, covers at least quite enough to prevent us from holding that it so absolutely fails to disclose any case within the Employers' Liability Act, that the trial Judge would have erred if he had found, on the facts, such a case and entered judgment thereunder.

I think that is a fair test of the possible meaning of the statement of claim here. If, down to the trial, respondents could pretend they were misled, and, therefore, did not plead want of notice, a motion to amend and set up alternative claims was made and allowed. This amendment could mean nothing short of claiming, as the meaning of the pleading, what I have suggested above as its intention and possible meaning. The learned trial Judge might well have refused this amendment unless and until the whole pleading had been put in less embarrassing form.

The refusal of the learned trial Judge to put plaintiff to an election, confirms my opinion, not only that it was possible either case might be shewn or appear, but that the case proceeded with everybody concerned understanding that the case might be found in either way as the facts and law applicable should disclose later.

The necessity for particulars of claim (so much relied on below) is just as great under the one Act as under the other—only there is there prescribed a slightly different mode of evincing them.

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I cannot see that either was adopted in this suit. Mere forms these are in either case; and can be supplied at any time by amendment as can also the pleadings. No one should be driven to another action for any of these things.

The questions of the cause of the death, the legal relations of the parties concerned in that and the consequences thereof were all threshed out at the trial.

There is nothing to prevent us from acting on section 54 of the Supreme Court Act and so amending, within that and other sections, as the Court below also could have done, and giving judgment accordingly, unless we should see that the respondents are entitled to say they were misled and now are, therefore, entitled to plead want of notice and claim a new trial.

I think the fair inference, from the correspondence produced, is that notice was given and I infer that all objections to it, if any possible, were waived; and, upon some features, the correspondence presents, but which I need not enlarge upon, there existed good reasons for the waiver.

I think, therefore, the appellants entitled to have the case maintained and disposed of on the merits; and claim upheld by whatever law it can be rested upon.

Now as to the merits of the appellants' case: the habitual compliance with the enactments requiring outlook and ringing of bell; even if such statutes are not such as appellants' action can rest upon; when habitually observed, as I have inferred they were, and as, in law, they may fairly be presumed to have been so observed, created a condition of things that the deceased was entitled to have relied on, as likely to continue.

The view of such a matter has been so well presented by Lord Esher, in *Smith* v. *The South Eastern Railway Co.* (1896), 1 Q.B. 178, in appeal at pages 182 *et seq.*, that I refer thereto and adopt his reasoning as applicable, and rely on it here.

More than that, I am prepared to hold, and do hold, that an engine merely used for shunting in a railway yard, such as this was, and especially running reversely, requires in its man-

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agement a high degree of care, and that, when the ringing of a bell or keeping of an outlook or possibly either on such occasions, as reason and due regard to the safety of those in the yard may reasonably require, has been abandoned, he, who being in charge or control, has thus abandoned such safeguards, without adopting some equivalent, quite as efficient, has been guilty of that sort of negligence that section 3, sub-section (*e*) of the Employers' Liability Act refers to.

Such was, I take it, too clear for argument, the case disclosed by the facts before us.

This opinion of the law, apart from statute, is clearly in accord with the principle of the common law and what was given expression to by Sir Henry Strong, The Chief Justice of this Court, in the case of *The Canada Atlantic Railway Co.* v. *Henderson,* 29 S.C.R. 632. at page 636, where he said:—

"Further I think it right to say that on this evidence (that the bell did not ring, that the speed was over six miles an hour, and that a flagman, stationed there, did not give warning), we should be justified in holding that there was common law negligence, as in the case of *The St. Lawrence and Ottawa Railway Co.* v. *Lett,* 11 S.C.R. 422," and, as on the same occasion, the late Mr. Justice Gwynne also said:—"I am of opinion that if the ringing of the bell would prevent an accident to a person crossing a highway, there is an obligation, at common law, to ring it," and, with what the late Chief Justice of Ontario, Sir George Burton, said, in the case of *Hollinger* v. *The Canadian Pacific Railway Co.,* 20 O.R. 244.

Thus I find, besides the case of the *Canada Southern Railway Co.* v. *Jackson,* 17 S.C.R. 316, not cited, but itself quite sufficient to meet the allegation of contributory negligence, the element of expectation, on the part of the deceased, that he might ring the bell or see the outlook, when relied upon by Mr. Justice Meagher, in connection with the question of contributory negligence, was fully justified. And thus I find further the amplest legal ground for maintaining the action and giving

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damages for $1,500, without relying on the Nova Scotia Railway statute, as enuring to the appellants' benefit. And as I have already said, the breaches of that statute, not being shewn to be the direct act of the company, or of a system adopted by it, but arising from clear neglect of duty, on the part of a fellow servant, can give no higher right that I indicate here.

I would allow the appeal with costs of appeal and costs of suit in all Courts below, save so much thereof as may have been occasioned by the striving of the appellants to maintain their right to damages exceeding the limit of $1,500, and enter judgment for that sum to be properly apportioned, but, as the majority of the Court take another view, say nothing further anent the same.

DUFF, J., agreed with Davies, J.

Appeal allowed with costs.

D. L. McPhee, solicitor for the appellants.
R. H. Butts, solicitor for the respondents.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—NEW TRIAL.

ONTARIO.] [COURT OF APPEAL.

BRENNER v. TORONTO R.W. Co.

(15 O.L.R. 195.)

New Trial—Misdirection—Charge to Jury—Objection at Trial.

Appeal allowed from the judgment of the Divisional Court, reported 13 O.L.R. 423, granting a new trial.

Per OSLER, J.A.:—There is no hard and fast rule which absolutely prohibits the Court from entertaining an objection on the ground of misdirection when the party has omitted to take it at the trial.

THIS was an appeal from the judgment of a Divisional Court reported 13 O.L.R. 423, 6 Can. Ry. Cas. 261, which was argued

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on the 23rd and 29th of May, 1907, before Moss, C.J.O., OSLER, GARROW, MACLAREN and MEREDITH, JJ.A.

D. L. McCarthy, for the appeal.
W. R. Smyth and *S. King*, contra.

October 4, 1907. Moss, C.J.O.:—The facts, the findings of the jury, and the grounds upon which the plaintiff sought and succeeded in obtaining a new trial in this case, are fully set forth in the judgments delivered in the Divisional Court, reported in 13 O.L.R. 423, 6 Can. Ry. Cas. 261.

Upon the jury's answers to the questions there could be no other judgment than that entered by the learned trial Judge, *i.e.*, a judgment dismissing the action.

Upon appeal to the Divisional Court many complaints against the Judge's charge and the jury's findings were urged on behalf of the plaintiff, but in the opinion of that Court the only one which was entitled to prevail was an objection to the charge on the ground of misdirection.

The point taken in the Divisional Court was that, in dealing with the fifth question, which involved a charge that the motorman was negligent in maintaining too great a rate of speed in approaching University street, and in failing to have the car under proper control at that point, which would have enabled him to avoid the accident after the plaintiff's danger became apparent, the learned Judge failed to direct the jury to take into consideration the defendants' rule No. 58 instructing motormen that in approaching crossings and crowded places where there is a possibility of accident the speed must be reduced and the car got carefully under control. The Divisional Court held that there was misdirection in this respect; that in effect there was a withdrawal from the jury of evidence which they should have been permitted, if not directed, to consider.

The question is whether this conclusion, which lies at the bottom of the decision of the Court that a new trial be had between the parties, is correct. Everything turns upon this, for if the jury were in fact prevented from considering the rules, the plaintiff is

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entitled to argue that, but for such prevention the answers to the first and fifth questions might have been different.

It is well settled, that in an action like the present, rules of the kind shewn in evidence here are evidence proper to be submitted to a jury on the question of the reasonableness of the speed of the car and of the conduct of the motorman in charge. Has it been made out that the learned trial Judge disregarded the law in this respect?

I am unable to come to that conclusion. It is for the plaintiff to demonstrate that the jury were or may have been misled by the charge into supposing that they were not to regard the rules as part of the evidence that they were to consider.

The rules were admitted in evidence and were undoubtedly before the jury as part of the case during the progress of the trial. The learned trial Judge in his charge dealt exhaustively with the whole case, going carefully into the details of the evidence and pointing out the law.

And it is clearly apparent, that he had not in his mind the intention of leading the jury to suppose that the rules were not evidence or that they were to put them out of their consideration. This is shewn, for example, by his references to the rules when dealing with the sounding of the gong.

Objection is made that the learned Judge, when requested by counsel for the plaintiff, declined to direct the jury that they were to take into consideration the rule already referred to. Objection in this form was not taken at the conclusion of the charge, nor was the learned Judge directly asked to direct the jury in that way. What passed between counsel and the learned Judge was, that at the conclusion of the charge and before the jury retired, counsel for the plaintiff asked him to charge the jury, that in addition to the original negligence he had spoken of, there was evidence from the motorman that he had not the car under control according to the proper method of running as given by the witnesses for the defence. Counsel referred to the evidence of certain witnesses as to the proper way to run the car when approaching the corner by slackening the speed. He made no mention of the rule or reference to it, but the learned Judge evidently had it in his mind, for, addressing the jury, he told

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them that it was not a question of the motorman's duty under the rule, it was a question what was reasonable for him to do. He then went on to explain that the motorman might break the rule four hundred times a day, but the question was whether he had acted reasonably under the particular circumstances of the case. After some further discussion, he again addressed the jury and told them that under the rules and practice of the defendant company, it was the duty of the motorman to throw off the power ordinarily before approaching a corner so as to be ready to get the car under control and more readily to have it under control, but the question was, was he going at such a speed as was excessive. He added: "It is not a question of what the rule was, but was he acting improperly in going at an excessive speed at the time." So far, therefore, was he removed from any intention to withdraw the rule from their consideration, that he specially directed their attention to it, at the same time very properly telling them, that the question whether he had broken the rule was not the question they were to decide, but what they were to decide was, whether supposing he had ignored the rule he nevertheless had the car under proper control and was not going at an excessive speed. I am unable to say that in this there was misdirection, or anything which was calculated to create an impression in the minds of the jury that in considering that question they were to put the rules aside and have no regard to the directions contained in them.

In order to obtain a correct notion of the impression likely to have been produced upon the minds of the jury, the charge should be looked at as a whole, and viewed in that way it appears to me that it is not at all likely that the jury in this case fell into the error of supposing that the learned Judge intended them to understand that they were not to consider the rules. Great weight was attached to the remark, said to have been made by the learned Judge after the jury had retired, to the effect that he had told them that the rules of the company had nothing to do with it. There must have been some misunderstanding with regard to this, for nowhere in the printed charge are there to be found any expressions that could be construed into such a statement to the jury, and it is clearly at

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variance with what he did tell the jury. It seems clear, from the objection which drew forth the remark, that counsel for the defendants understood the charge to have comprehended the rules, as well as the other evidence bearing on the question of the reasonableness of the motorman's action. That plaintiff's counsel held the same opinion seems to be shewn by the fact that he made no objection in terms to the alleged withdrawal of the rules.

I mention this not as indicating an opinion that failure to raise an objection should be treated in every case as an absolute bar to relief on that ground, but merely as shewing that at the time counsel did not gather the impression which it is now argued the charge may have conveyed to the minds of the jury.

I do not think that there was any miscarriage or that any grounds for a new trial have been shewn.

The appeal should be allowed and the judgment at the trial restored.

OSLER, J.A.:—I agree in the result, being of opinion that there was no misdirection in the learned Judge's charge.

I only desire to add that in my opinion, there is no hard and fast rule which absolutely prohibits the Court from entertaining an objection on the ground of misdirection when the party has omitted to take it at the trial. That is and ought to be the general rule, but misdirection sometimes results in a mistrial or in a failure to guide the jury in dealing with the essentials of the case, and when that happens and a substantial wrong or miscarriage is occasioned thereby, I have no doubt that the Court can and ought to interfere even though no objection was taken to the charge.

The appeal must be allowed with costs, if demanded.

MACLENNAN, J.A.:—The one substantial question is whether the plaintiffs were entitled to a new trial on the ground of misdirection.

If there were such misdirection, the plaintiffs are entitled to a new trial generally, it affected the whole question of negligence, and might materially affect all the findings of the jury upon that question, so that, nothing is gained by discussing any question of negligence

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at the last moment, or negligence at any earlier stage; a question which does not now arise, and one which may never arise, in this case, so far as any court of appeal is concerned.

In order to *entitle* a party to a new trial on the grounds of misdirection three things must exist: (1) it must be a material misdirection; (2) it must have been distinctly objected to at the trial; and (3) some substantial wrong or miscarriage must have been occasioned by it.

Each one of these essentials is wanting in this case: the first two being, the third must necessarily be, absent.

The contention, to which the Divisional Court gave effect, was that the trial Judge withdrew from the consideration of the jury the working rules of the defendants, made for the guidance of their servants, proved at the trial; that he told the jury that the defendants' rules had nothing to do with the case.

But he told them nothing of the sort. There is no sort of ground for contending that he did. The only excuse for it is to be found in the remark to that effect which appears in the short-hand report of the trial. But that remark, if really ever made, was not made in the presence of the jury, and obviously, could not have had any sort of effect upon them. I would have supposed it to have been erroneously reported; but, if not, it must have been but an innocuous slip of the tongue, not to be wondered at, perhaps, after the exceeding patient and accommodating manner in which very many and very long requests to charge the jury further upon many subjects, in the way the plaintiffs desired that they should be charged, had been permitted to be made in the presence of the jury, the result of which was, that their counsel had, for all practical purposes, another opportunity of presenting his arguments to the jury, and so the last word with them.

That there is no sort of ground for this contention is apparent on all hands. It would be a stultification of the act of the Court in permitting evidence to be given of such rules, evidence which took up considerable time, and to which no one objected in any manner; but which was given and received as if it were just as material as any other part of the plaintiff's case.

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In one part of the charge the very opposite of what is contended for was clearly and distinctly put in these words: "Therefore it was his duty to sound his gong at University street. It is recognized by the rules of the company as being the proper thing for the motorman to do. It is therefore, not too much to say, that that course, being recognized as reasonable by the company, should be recognized as reasonable by the public, and that they should expect it to be followed." What possible ground of objection, by the plaintiffs, can there be to such a statement as to the materiality and effect of the plaintiffs' rules? Surely, if there be any objection to it, it is not on their part. But it is said that the learned Judge was then discussing the question of the sounding of the gong? But, what possible difference can that make, for he was dealing with one of the rules of the defendants, all of which are in this respect upon the same footing, and were proved in the same manner, and at the same time.

During the very long discussion, carried on by the plaintiffs' counsel with the learned Judge, immediately after he had finished his charge, the following observation was made by him: "It is not a question, gentlemen of the jury, as to the motorman's duty under the rule, it is a question of what is reasonable for him to do." Again, what objection can justly be made to this? Should the learned Judge have said, "It is not a question whether the motorman acted reasonably; the question is, did he obey the rule?" Supposing the rules had been in the defendants' favour, and they were endeavouring to avoid liability for negligence because the motorman had done all that the rules required of him, would the plaintiffs think the charge, that obedience to or disobedience of the rules was not the question which the jury had to try, but that that question was, whether reasonable care was taken, was very erroneous? There is nothing whatever that took place in the presence of the jury, from first to last, throughout the trial, that detracts in any manner from these observations as to the effect of the rules, nor anything in any manner withdrawing them as evidence—the same as all the rest of the evidence adduced—from the consideration of the jury. There was, therefore, no misdirection, such as the plaintiffs contend for.

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In these circumstances, it is not to be wondered at that there was no sort of objection to the Judge's charge in this respect; it would indeed be rather surprising, if there had been, on the plaintiffs' part. Search as one may throughout the very many requests, objections and observations of the plaintiffs' counsel, nothing of the sort can be found, though it was clearly not a case of omitting anything which might have been said, or of saying too little.

In regard to the charge generally, it may, I think, be safely said, that if all charges afforded as much evidence of painstaking and accuracy, there would be very little to be reasonably found fault with; though it is certainly a mistake to allow another speech to be made in the presence of the jury in the guise of objections to the charge.

And, as I have said before, there being no misdirection, nor any objection to the charge on the ground of misdirection, respecting the rules of the defendants, it is obvious, that there was no substantial wrong or miscarriage occasioned by any such misdirection.

It would be a thing very much to be regretted, if any of the Courts should drop into a loose practice of granting new trials. One trial should, generally speaking, be quite enough: and no encouragement should be given to any sort of loose manner of conducting a trial, by any of the parties to it, upon the notion, that anyway, if they are only careless enough, they can get another trial. The cost of a wasted trial is a serious matter: the injustice of giving a party a second chance, except for very substantial reasons, is manifest. Besides, it must always be remembered, that the jury have certain absolute rights, powers and duties, which the Court has no more right to invade or disregard, than the jury have to invade the province of the Court, or to disregard their proper instructions; and that, to grant a new trial, because the Court may not like the verdict, or upon any but substantial and established grounds, is really a disregard of the sole functions of the jury, and an invasion of their province. But, if the evidence were to be weighed, and the case re-tried, here, and notwithstanding the sympathy which one may, and indeed must, have for the plaintiffs in their great misfortune, can it be said, that the findings of the jury were not, even at

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the least, well warranted by the evidence? Can it be said, that the real cause of the accident was not the imprudent manner in which the female plaintiff attempted to cross the railway tracks? And, if the position of the parties were reversed, and the defendants were here seeking a new trial under quite similar circumstances and on the like grounds, can it be doubted, that the application would be summarily dismissed? Such a test is not always out of place.

I am quite unable to perceive how any sort of injustice, from a legal point of view, was done to the plaintiffs at the trial, or to find any good excuse for interfering with the verdict of the jury there rendered, or with the judgment directed by the trial Judge to be entered thereupon, and would therefore allow this appeal.

GARROW and MACLAREN, JJ.A., concurred.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—STREET RAILWAY.

ONTARIO.] [COURT OF APPEAL.

SIMPSON v. TORONTO AND YORK RADIAL R.W. CO.

(16 *O.L.R.* 31.)

Street Railways—Accident—Negligence—Evidence—Leaning Over to Expectorate.

The plaintiff, as a passenger, was, about midnight, standing on the back platform of one of the defendants' cars, smoking a cigar and leaning upon the railway gate or grating at the side, over which he leaned, from time to time, a distance from five to seven inches, and expectorated. Apparently, while doing so, he was struck by something and received the injuries complained of. The plaintiff alleged, in his statement of claim, that he was struck by a post belonging to the defendants and used by them for their trolley wire, but gave no evidence as to this. As a matter of fact, there were trolley poles along the line of the defendant railway on the side where the plaintiff was struck, but there was no evidence given by the plaintiff of their position, and the evidence for the defendants placed them about two feet from the overhang of the car:—

Held (reversing the judgment of the Divisional Court), that the plaintiff's action should be dismissed, as there was no evidence of what caused the injury; MEREDITH, J.A., dissenting.

Per RIDDELL, J. (in the Divisional Court):—While it is impossible to lay down any specific rule for the guidance of railways or street railways generally, a railway operating in a country in which tobacco chewing or

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gum chewing is not uncommon must expect its patrons, or some of them, to be tobacco and gum chewers, and if it be the custom of such passengers to put their heads past the lines of the car to expectorate, the railway should be held to know of such custom, and should either remove all obstructions from the side of the track a sufficient distance to avoid the probability of an accident, or prevent the passengers from projecting their heads over the side, or at least give proper warning as to the danger. And in every case the railway must take all reasonable precautions against an accident happening to one who is acting as in the ordinary course of affairs "in the vicinage" it may be expected that some will act.

The Massachusetts rule that it is necessarily negligence for one riding in a railway car to project any portion of his person out of the window not followed by the Divisional Court.

THIS was an appeal by the defendants from the judgment of the Divisional Court affirming a judgment of MABEE, J., entered at the trial of the action.

The facts are fully stated in the judgments.

The appeal to the Divisional Court was argued on April 16, 1907, before FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

T. C. Robinette, K.C., and *C. A. Moss*, for the defendants.

J. T. Loftus, for the plaintiff.

May 20th, 1907. BRITTON, J.:—The plaintiff's allegation is that on September 4th, 1905, he boarded a car of the defendants at Long Branch for Toronto, and, as the car was crowded and as he wished to smoke, he stood on the rear platform of the car. He leaned back over the wire gate of said car, which was quite low, and in so doing was struck by a post belonging to the defendants, and used by them for their trolley wire. The action was tried by Mabee, J., with a jury, and resulted in a verdict for the plaintiff and for $500 damages.

I have reached the conclusion that upon the whole case there was evidence of negligence on the part of defendants proper to be submitted to the jury, and that the nonsuit asked for was properly refused.

Upon the evidence the jury could find that the plaintiff's injury was sustained by his head coming in contact with a trolley pole. A pole placed by defendants in such close proximity to the rails upon their line of railway that a person standing upon the rear

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platform and projecting his head, as would naturally be done, and as plaintiff says he did, for the purpose of spitting, could be injured by that pole, is dangerous, and so placing it is evidence of negligence.

The plaintiff's evidence is that the car was not crowded, nor was the rear platform crowded. The plaintiff stood upon the platform because he wished to do so. Defendants permitted this, and permitted smoking by passengers when there; and the defendants did not permit smoking by passengers on some seats in the car, and they prohibited spitting upon the floor of the car.

That being the case, if the poles are so near to the cars as to be dangerous, the defendants should by a wire netting or in some way so protect or warn passengers as to prevent such an accident as happened in this case.

The case was wholly for the jury, unless it can be held as a matter of law that what plaintiff did was *per se* contributory negligence. I do not think it was. Leaning over the rail and looking out, extending one's hand or arm or any part of the body beyond the car in motion, may be evidence of contributory negligence, and under certain circumstances would be contributory negligence.

I can not go so far as to agree with the decision in *Todd* v. *Old Colony and Fall River R. R. Co.* (1861), 3 Allen 18, to which we were referred.

In *Spencer* v. *The Milwaukee and Prairie du Chien R.R. Co.* (1863), 17 Wis. 503 (Vilas and Bryant's notes), it was held not error for the circuit court to refuse to "instruct the jury that if the plaintiff was sitting with his elbow or arm projecting out of the window, and sustained the injury complained of by reason of that fact, he could not recover." In that case it was held "that it was properly left to the jury to determine, under all the circumstances of the case, whether the plaintiff was guilty of negligence in respect to the position of his arm."

In *Francis* v. *New York Steam Co.* (1886), 1 N.Y. State Reporter, p. 261, it was held by the New York Common Pleas (Allen, J.) that to have the arm out of the window of a street car is not

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negligence *per se*, and whether negligence or not depends upon the circumstances of the case.

In *Holbrook* v. *Utica and Schenectady R.R. Co.* (1855), 12 N.Y. 236, 244, the Judge charged the jury that it was for them to say whether the plaintiff's arm was out of the window at the time of the injury, and if it was that was a circumstance from which they might infer negligence or want of ordinary care on her part. The Judge was requested to charge that if the jury found that the plaintiff's arm or elbow was outside the window of the car, it was an act of negligence, and she could not recover. The Judge refused to so charge, and the Judges of the Court of Appeal were unanimously of the opinion that the trial Judge was right, and that he had properly directed the jury.

The defendants were, no doubt, taken at a disadvantage by the plaintiff having changed the location of the accident from that given by him upon his examination for discovery, but that was rather a ground for postponement of the trial than ground for a new trial.

As to damages, no doubt the jury estimated them very liberally as against these defendants, but the amount can not be considered so unreasonable or so excessive as to afford ground for a new trial as of right.

In view of the fact of the place of accident not having been correctly stated by plaintiff in his examination for discovery and the amount of the damages being large for the injury actually sustained, I think the appeal should be dismissed without costs.

FALCONBRIDGE, C.J.:—There is only one point in the case, viz., whether a passenger is disentitled to recover by reason of contributory negligence for an injury received through having any part of his body projected beyond the outside edge of the structure of the car in which he is being conveyed.

The point has not arisen in England or in Ontario. The authorities in the United States are in conflict.

My brother Riddell has carefully exploited the leading American cases. After collating and considering these, the only matter

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which has weighed on my mind to "give us pause" was the *dictum* of Mr. Beven (Negligence, 2nd ed., vol. 2, p. 1204), that "in England . . . there is no reason to doubt that the Massachusetts rule would be adopted."

It is with great diffidence that one ventures to dissent from the opinion of so eminent an authority.

But we have all come to the conclusion that the Massachusetts rule ought not to be adopted here, and that the question is one for the jury.

The appeal will be dismissed but without costs, for the reason given by my brother Britton.

RIDDELL, J.:—The plaintiff was about midnight of September 4th, 1905, riding upon a car of the defendants coming from Long Branch to Sunnyside. He was standing at the back, upon the platform, smoking a cigar, and leaning upon the grating with his elbow, the grating being of convenient height. He leaned over the side from time to time, and expectorated on the street. While doing this, he was struck by something, rendered unconscious, remaining so for about three days, and, in consequence of the blow, suffered considerably for about six weeks, and still feels the effects. He brought an action, which was tried before my brother Mabee, with a jury, at the assizes in Toronto in February, 1907. A general verdict was rendered for the plaintiff, with damages $500.

The defendants now appeal.

Upon the motion before us it was argued that there was no evidence of the cause of the accident; that there was no evidence of negligence on the part of the defendants; that the conduct of the plaintiff was itself contributory negligence in law; and that the Judge's charge was erroneous. A new trial was asked for, also, on the ground of surprise.

Had the defendants rested with the case as presented by the plaintiff, I think the motion for a nonsuit should have been granted. I do not think the facts as established by the plaintiff's evidence shewed even a *primâ facie* case of negligence. That simply shewed

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that, riding on a car of the defendants, and projecting his head a short distance beyond the side of the car, the plaintiff received a blow from some source. There was no evidence that this blow came from a pole or that there was any pole near the track. No doubt, if anything happened to the car itself, such as running off the track, the principle of *res ipsa loquitur* would apply, but there was nothing of that kind here, and I do not think that principle could be extended here so as to throw upon the defendants the onus of proving non-negligence on their part.

But it is not necessary to pursue that inquiry further, as the evidence adduced by the defendants takes the case very much further. It was proved that some months after the accident the defendants, upon trying a snow plough, which projected over the rails one foot, "pretty near," further than this car, found it necessary to move back some of the poles to allow for the overhang, that this was done on the north side of the track (the accident occurred on the north side), and that about twenty poles had to be moved in the five miles west of Nurse's Hotel; none, as the witness says, however, nearer the Humber than "possibly half a mile or three-quarters of a mile." The plaintiff says he was injured about one hundred yards west of the Humber, but says that his ideas as to where the accident happened are very hazy outside of what his witnesses told him. Thompson says that the accident took place about half a mile the other side of the Humber, so far as he could judge—half a mile west of Nurse's Hotel—and both Thompson and Miss Farrell say the accident took place on a curve. There was ample evidence upon which a jury might find—and had I been trying the case I should have found—that the accident took place upon this curve—Hick's curve—that at that point there was a post certainly within one foot, and perhaps much less, of the car, and that this it was which struck the plaintiff's head. The plaintiff's evidence is that his head was protruding three or four inches, though he thinks not five or six or seven inches; and no other cause can reasonably be suggested which would occasion the accident. I do not think this is a mere guess or conjecture.

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The question of negligence of the defendants and contributory negligence of the plaintiff must, as stated by my brother Britton on the argument, be taken together. By the defendants it was urged that it is negligence *per se* for a passenger to put his head or any part of his body beyond the side of the car, and that the railway company cannot be held bound to provide that, in case he acts thus negligently, there shall be no obstruction near enough to hurt him.

No doubt there is a considerable body of authority in the courts of some of the United States going the full length claimed by the defendants. And, while we are not bound by such decisions, we welcome the assistance they afford in arriving at principles of law which may well be considered equally applicable to two peoples living in a similar state of society and material advancement, and under systems of government and law not in their essence dissimilar.

Most of the cases will be found collected in Elliott on Law of Railroads, 1897 ed., sec. 1633. See now the second and much-improved edition of 1907, s. 1906, C.Z. and elsewhere. Several others were cited to us by counsel for the defendants upon the argument. It may be of advantage to quote from a few of these.

It was held in a case in Massachusetts, *Todd* v. *Old Colony and Fall River R.R. Co.*, 3 Allen 18, 80 Am. Dec. 49 (Supreme Judicial Court of Massachusetts): "If he (the plaintiff) was then riding on the car with his elbow or arm projecting out of the window, by reason of which he sustained an injury, he was guilty of a want of due care, which would prevent him from maintaining his action. Looking at the mode in which railroads are constructed, with posts and barriers, which are placed very near to the track on which the cars are to pass, the rapid rate at which trains move, the manner in which cars are made, with seats to accommodate passengers so as to avoid any exposure of the body or limbs to outward objects in passing, we can see no ground on which it can be contended that a person, in travelling on a railroad, is

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exercising reasonable care in placing his arm in such a position that it protrudes from a window, and may come in contact with external obstructions. Certainly, if it is a want of due care to attempt to leave a car when a train is in motion, although going at a slow rate of speed, as has been heretofore determined by this Court, it is no less a want of proper care to ride in a car with an arm or leg exposed to collision against passing trains or the necessary obstructions on the sides of the track" (pp. 51-2). It is in referring to this case that Mr. Beven, in his admirable work on Negligence in Law, 2nd ed., vol. 2, p. 1204, says: "The point has not arisen in England, where there is no reason to doubt that, should it, the Massachusetts rule would be adopted."

In *Bridges* v. *Jackson Electric Railway Light and Power Co.* (1905), 38 So. Rep., 788, 39 Am. & Eng. R.R. Cas. (N.S.), 512, a passenger left his seat and went and stood on the car platform, and then, when the car was running, he attempted to regain his seat by way of the running board, and this was held to be contributory negligence. It was also considered that there is no duty imposed on street railways of preventing their passengers running unnecessary danger.

In *Favre* v. *Louisville and Nashville R.R. Co.* (1891), 16 S.W. Rep. 370, 91 Ky. 541, it was held that for a person in a rapidly moving railway train to permit his hand to protrude from a window of the car in which he is sitting is such contributory negligence as to prevent his recovering damages for injuries received by its striking some object outside, following *Louisville and Nashville R.R. Co.* v. *Sickings* (1868), 5 Bush. 1, in the same court, holding that such an act, even though the arm was but a very short distance beyond the window, was gross negligence.

Huber v. *Cedar Rapids and M.C. R.W. Co.* (1904), 35 Am. & Eng. R.R. Cas. (N.S.) 768, 100 N.W. Rep. 478, decides that where a passenger on a street car, while standing on the platform, leaned over a railing for the purpose of seeing where certain smoke came from to such an extent that he was struck by a trolley pole located from fourteen to seventeen inches from the side of the car, and

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from nineteen to twenty-four inches from the railing, he was guilty of contributory negligence as matter of law.

The Court, speaking of the usual and obvious perils for which one on the platform of a car must look out, says (p. 770):—"Probably the danger from too close proximity of the trolley pole is not to be included among these perils, for passengers have the right to assume that the road has been so constructed as to obviate collisions therewith in the ordinary course of travel, and are not required to keep a look-out for such poles. . . But it does not follow that these poles must be placed beyond the reach of passengers. A passenger is held not to be negligent, as a matter of law, in allowing his hand or part of his arm to protrude from a street car window: *Dahlberg* v. *Minneapolis Street R.W. Co.* (1884), 32 Minn. 404; *Seigel* v. *Eisen* (1871), 41 Cal. 109; *Summers* v. *Circuit City R.R. Co.* (1882), 34 La. Ann. 139; *Miller* v. *St. Louis R.R. Co.* (1878), 5 Mo. App. 471; *Germantown Passenger R.W. Co.* v. *Brophy* (1884), 105 Pa. 38. But it is only when this is incident to his position in the car, and we have discovered no case in which voluntarily extending the arm any considerable distance beyond the surface of the car, or protruding the head through the window, has been treated otherwise than as negligence *per se*. Everyone appreciates the danger of exposing any portion of the person beyond the sides of a rapidly moving car, and, when voluntarily done, the current of authority is to the effect that it is such negligence as to preclude recovery for the injury received: *Benedict* v. *Minneapolis & St. Louis Ry. Co.* (1902), 90 N.W. 360, 86 Minn. 224. The distinction is illustrated in *Cummings* v. *Worcester, Leicester and Spencer Street R.W. Co.* (*Mass.*) (1896), 166 Mass. 220, where a passenger was riding on the front platform or steps of a closed car. He claimed that he had one foot on the step and the other on the platform facing it, and that he happened to turn his head in the direction the car was moving, when he was struck on the face by a post; while the evidence of the defendants tended to shew that he was facing the street, with both feet on the lower step, his left hand on the dasher rail, and his right hand on the body rail, intentionally

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leaning out beyond the car, and looking back in the opposite direction from which it was going. Instructions to the effect that 'a casual or momentary leaning out, such as would be incident to securing a more comfortable or safer position, would not necessarily preclude him from recovery,' but that, if he was in the position described by the defendants' witnesses, deliberately leaning out beyond the car line and looking back when struck, he was negligent as a matter of law."

Indianapolis and Cincinnati R.R. Co. v. *Rutherford* (1867), 29 Ind. 82. A passenger put his arm several inches outside of the window, and it came in contact with a water tank. Held, contributory negligence as matter of law, following *Todd* v. *Old Colony and Fall River R.R. Co.*, 3 Allen 18; Elliott on Railroads, 1897 ed., sec. 1633; *Catawissa R.R. Co.* v. *Armstrong* (1865), 49 Penn. 186, the decision in the latter case not being in point in this discussion.

Pittsburg and Connellsville R.R. Co. v. *Andrews* (1873), 39 Md. 329. If a passenger of mature years voluntarily or inattentively projects his elbow or arm out of the window of a railroad car in which he is travelling, and it is injured by coming in contact with a freight car standing on a siding near the main track of the railroad, he is not entitled to recover damages for such injury. The placing of his arm out of the window is an act of contributory negligence, and the Court should so instruct the jury as matter of law.

This case discusses many of the cases theretofore decided in the State courts, and mentions one in which the contrary doctrine was held. In *Spencer* v. *Milwaukee and Prairie du Chien R.R. Co.*, 17 Wis. 488 (503), it was held (p. 493) that "it is a matter of fact whether a person riding in a railroad car and placing his arm upon the window base, even if it extends slightly outside, does so in a manner hazardous and dangerous under the circumstances, or whether he exercises all proper and reasonable care and attention to his personal safety. It is incumbent upon him, of course, so to conduct himself as not to expose his limbs to collision from obstacles outside. The party must be entirely free from negligence which contributes to the injury, and it was for

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the jury to say, under all the circumstances, whether the plaintiff was wanting in care and attention or not." The Court (pp. 493, 494) goes on to consider if it could be laid down as matter of law that a passenger is chargeable with negligence who extends his arm or hand in the slightest degree out of the window; and then says (p. 494): "There is always more or less space between the outside of the car and any structure erected by the side of the track, and must necessarily be so, to accommodate the motion of the car. Passengers know this, and regulate their conduct accordingly. They do not suppose that the agents and managers of the road suffer obstacles to be so placed as barely to miss the car while passing. . . . Of course, a case might be supposed where carelessness would be clearly apparent from the circumstances. If a passenger should ride with his body half out of the car or with his arms or feet so protruded that they would inevitably expose him to danger and collision, we should have no hesitation in saying that he was utterly reckless." The Court also holds "that the rule laid down in the case of *Todd* v. *Old Colony and Fall River R.R. Co.*, 3 Allen 18, is . . . contrary to the weight of authority and unsound in principle."

Christensen v. *Metropolitan Street Ry. Co.* (1905), 137 Fed. Rep. 708; 41 Am. & Eng. R.R. Cas. (N.S.) 250. Screens with large meshes, fastened across the lower half of the windows of a street car on the side next the poles supporting the trolley wires, are a sufficient protection against the accidental injury to passengers from such poles, and a sufficient warning of the danger of such injury to absolve the railway company from the charge of negligence in that regard. And a passenger in a street car who, on account of sudden illness, extended her head through a window above a screen which covered the lower half of the window, and was injured by striking against a trolley pole beside the track, being obliged, in order to so reach the window, to stand up or kneel upon a seat, was chargeable with contributory negligence as matter of law. At 41 Am. & Eng. R.R. Cases, at p. 254: "The company was not required to anticipate that the plaintiff might become ill and attempt to put her head out of

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the window, when it would be impossible for her to do so without turning about and either kneeling or standing on the seat."

It will be seen that the decisions are not uniform; it will also appear that many of the decisions derive ultimately from the *Todd* case. That case and many other cases in the same sense are decisions of Courts in which the law is also laid down that it is negligence *per se* for a passenger to attempt to leave a moving train. Our Courts have refused to follow these Courts in that decision: see *Keith* v. *Ottawa and New York R.W. Co.* (1902), 5 O.L.R. 116. Many of the cases will be found on p. 119 of that report, and many more, I think, in the printed appeal book. And while I feel very great regard for the opinion of Mr. Beven, as well as profound gratitude to him for his excellent text-books, I do not think it would be wise to act upon the conjecture of any text writer, however eminent, as to what the Courts in England would probably decide.

The case seems to be without authority by which we would be bound, and it must, therefore, be decided upon principle. The decision in the Wisconsin case cited above recommends itself to my judgment. It seems to me impossible to lay down any specific rule for the guidance of railways or street railways generally. In some railways—for example, those whose object, or one of whose objects, is to take passengers through scenery—it must be expected that passengers will lean out to look back or forward; some railways which permit, if they do not invite, overcrowding, which compels some to stand on the steps and project part at least of their frame beyond the line of the car, must expect this to happen, and guard accordingly. A railway operating in a country in which tobacco chewing or gum chewing is not uncommon must expect its patrons, or some of them, to be tobacco or gum chewers, and if it be the custom of such passengers to put their heads past the line of the car in order to expectorate—whether this is due to the prohibition against spitting in the car or some lingering remains of common decency—the railway should be held to know of such custom. And in every case a railway company must take all reasonable precautions against an accident happening to

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one who is acting as, in the ordinary course of affairs "in the vicinage," it may be expected that some will act. By "ordinary" I do not mean happening always—or every minute, or every hour, or every day, perhaps not every week—but as likely to occur from time to time.

It is a matter of common knowledge that tobacco chewers are to be found from time to time upon street cars, that some of them at least are decent enough to get rid of their superfluous saliva over the side of the car, and that, in doing so, they may sometimes be expected to project the head some distance beyond the line of the car. If we are not judicially to say that this is common knowledge, at least it would be a question for the jury. This being so, it seems to me that the company must take means to prevent the occurrence of an accident to a person thus acting. If, for no reason that can be suggested, posts are allowed so near to the rail as that one acting in this way may be struck on the head, they should be moved back. If, as was suggested during the argument, it be the case of a building which cannot be moved, either the railway must itself be moved further away or, if this be impracticable, a screen should be placed so as to prevent the head being protruded, or at least some warning should be given. A screen reaching up to the elbow of a man standing on the platform, so far from being a warning, seems to me, using common knowledge of human nature and human practices, rather to hold out an invitation to lean over it than a warning to keep away from it. At all events, that is for the jury. And what I have said about the tobacco chewer applies to the tobacco smoker. Many, no doubt, would like to see tobacco smoking abolished, but, so long as it is lawful and usual, so long must the railway companies consider it. If, as is, I think, common knowledge (if not, it is for the jury), smokers sometimes and ordinarily expectorate and that over the line of the side of the car, the railway companies should either remove all obstructions from the side of the track a sufficient distance so as to avoid the probability of an accident, or they should prevent the passengers from pro-

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jecting their heads over the side, or at the least give proper warning as to the danger.

There was ample evidence upon which the jury could, as they did, find the cause of the accident to be the negligence of the defendants. In this case the extent to which the head of the plaintiff was projected was not such as to make his act negligence *per se*, and it was rightly left to the jury to say whether his act, under the circumstances, was negligence at all.

It was argued that the plaintiff could not have been struck by a post, as a post that would strike his head would also strike the top of the car. To this the answer is apparent. Supposing that the post were vertical, the car would not be struck at all, while if the post was close to the car any projection from the side of the car would be struck. If, as contended, the posts were planted eighteen inches from the line of rail, it is apparent that the head being seven feet and the top of the car ten feet from the rail, if the post at the bottom was on the same horizontal plane as the rail, at the height of the plaintiff's head—to touch the top of the car three feet higher—the post need not be within five and a half inches of the side of the car. And if, as is indicated in the plan, the post was planted two feet below that plane, the track being elevated above the ground, this would be a distance of four and a half inches. This argument, it seems to me, proves nothing except, perhaps, that the plaintiff could not or did not distinguish accurately the distance his head projected; and, perhaps, it was really "four or five inches," instead of "three or four inches."

I cannot find anything in the charge of the learned Judge (fairly read) that is objectionable, and no objection was taken at the trial: *Fitzpatrick* v. *Casselman* (1869), 29 U.C.R. 5; *Regina* v. *Fick* (1866), 16 C.P. 379. Of course, the fact that no objection was taken at the trial is not in all cases conclusive against the application, but it is so ordinarily.

It is true that the trial Judge plainly shewed, in his remarks to the jury, that he thought the plaintiff entitled to their verdict. A trial judge has the right to do this if he sees fit: *Dougherty* v.

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Williams (1872), 32 U.C.R. 215; *Scougall* v. *Stapleton* (1886), 21 O.R. 206; see *per* Galt, J., at pp. 208, 209.

It sometimes is his duty to give the jury the advantage of seeing how the evidence has affected his mind, although it is not in practice very frequently found necessary to impress upon the jury the merits of an action against a railway company charged with negligence. All that, however, is for the trial Judge.

Then it is said that the defendants were taken by surprise, because, as is alleged, upon the examination for discovery, the plaintiff said the accident had happened a short distance west of the Humber, and therefore the defendants had caused their engineer, Green, to examine as to the position of the posts for only about one-third of a mile west of the Humber. This same evidence was given by the plaintiff at the trial, and it was not apparently till near the close of the evidence that the witness Thompson said that the accident took place about half a mile west of the Humber. No application was made to the learned trial Judge for a postponement, and nothing was said about the alleged surprise at the trial at all. The defendants went on and took their chances of a verdict. We are told that they did not see the full significance of the evidence till the learned Judge was delivering his charge—at all events, nothing was said as to any surprise. I am of opinion that it is the duty of any party to an action who claims he has been taken by surprise to apply to the trial Judge for an adjournment. It may often happen that the evidence complained of may be withdrawn, or a reasonable time given to investigate, and, if possible, meet it. Where a party deliberately stands by, says nothing about being taken by surprise, and takes his chances of a verdict, I think it would require a very strong case to be made out to induce a Court to grant the application when he comes afterwards to ask for a new trial. Here I do not think any case is made out at all. All that Green did was to examine the position of the poles as they stand now, and that is all that it is suggested he would have done had the information of the defendants been more accurate. He does not know anything as to whether the poles are the same as at the time of the accident.

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Wilson is the only one apparently who knows anything about the matter of removal of the poles, and he was, at the trial, examined and cross-examined. If any question was omitted that ought to have been asked, that is the misfortune of the defendants, but no ground of surprise or for a new trial. It was apparent before the close of the evidence at what point it would be contended the accident took place, and if Wilson could have given any evidence which would assist the defendants, he should have been asked. It is, I think, apparent that he could not; his recollection is too indistinct.

The verdict is not large, and, so far as I can see, the merits of the case are not with the defendants. It must, also, be apparent that if, after the evidence already given, it were attempted by the defendants to make out that no change was in reality made and no poles taken out at about half a mile from the Humber, the attempt would be practically hopeless.

The appeal should be dismissed, but without costs, for the reason given by brother Britton.

The defendants appealed from the above judgment, and the appeal was argued on November 15th and 18th, 1907, before Moss, C.J.O., and OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

I. F. Hellmuth, K.C., and *C. A. Moss*, for the appellants, contended that there had been no legal negligence on the part of the defendants; that a railway company was under no obligation to place its poles further away than was necessary to give a fair clearance; and that the plaintiff had been guilty of contributory negligence. He cited Beven on Negligence, 2nd ed., p. 1204; *Pittsburg and Connellsville R.R. Co.* v. *McClurg* (1867), 56 Penn. 294; *Interurban Railway and Terminal Co.* v. *Hancock* (1906), 78 N.E.R. 964; *Dun* v. *Seaboard and Roanoke R.R. Co.* (1884), 78 Virg. 645; *Holbrook* v. *Utica and Schenectady R.R. Co.*, 12 N.Y. (Kernan) 236; *Richmond and Danville R.R. Co.* v. *Scott* (1892), 88 Virg. 958; *Fahner* v. *Brooklyn Heights R.R. Co.* (1903), 86 App. Div. (N.Y.) 488; *Farmer* v. *Grand Trunk R.W. Co.* (1891), 21 O.R. 299; *Sias* v. *Rochester R.W. Co.* (1897), 18 App. Div.

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(N.Y.) 506; and contended that, in any event, there should be a new trial.

Loftus, for the plaintiff, contended that the plaintiff had a reasonable excuse for leaning out and acted at the time of the accident in a reasonable and orderly manner, and was entitled to damages without being bound to shew the exact cause of the accident: *McArthur* v. *Dominion Cartridge Co.*, [1905] A.C. 72; *Fenna* v. *Clare & Co.*, [1895] 1 Q.B. 199; *Snell* v. *Toronto R.W. Co.* (1900), 27 A.R. 151. He also referred to Booth on Street Railways, sec. 360; *Spencer* v. *Milwaukee and Prairie du Chien R.R. Co.*, 17 Wis. 488 (503); *Todd* v. *Old Colony and Fall River R.W. Co.*, 3 Allen 18.

Hellmuth, in reply.

January 22, 1908. GARROW, J.A.:—Appeal by the defendants from the judgment of a Divisional Court affirming the judgment at the trial in favour of the plaintiff before Mabee, J., and a jury.

The action was brought to recover damages caused to the plaintiff while a passenger on the defendants' electric street railway.

Two acts of negligence are alleged in the statement of claim, one that the grate or grating, as it is called, on the rear of the car was so low as to induce passengers to lean on it; the other that the defendants had placed and maintained a trolley post or pole so near the car that a passenger so leaning on the gate would be struck by it. As will appear, the first ground is of no consequence unless the second is also established. Three witnesses were examined on behalf of the plaintiff, namely, the plaintiff himself, one Harry Thompson, and Miss Mabel Farrell.

The accident occurred some time after midnight on September 4th, 1905. The plaintiff had been conducting a dancing class that day at Long Branch, a resort some miles to the west of the city of Toronto. The witness Harry Thompson supplied the music for the dancing, and Miss Farrell had apparently been in the plaintiff's company all day, and they were all returning by the last car to Toronto. The car was not crowded. It was

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what is known as an open car. Harry Thompson and Miss Farrell, with one or two others, were seated on the rear seat, and the plaintiff was standing near them on the north side of the car, leaning on the grate and smoking a cigar, and, as he says, occasionally expectorating over the side of the car, for which purpose he protruded his head beyond the line of the car a distance not exceeding five or six or seven inches, and while doing so was struck by what he supposed was a trolley pole, knocked senseless, and fell back among those who were sitting down.

The night was dark. The plaintiff saw no trolley poles, was not looking out for them, although he knew the track well, and had travelled over it many times. No one else was standing. He stood because he desired to do so, not because it was otherwise necessary. When he last remembers they were near the Humber. When examined for discovery he had been more specific. At that time he said he was struck "down near the Humber," "very near the end of the run, two posts away from the store at the Humber—a little way from the hotel." This portion of his deposition was put in at the trial by the defendants.

Harry Thompson said he was sitting at the rear of the car. It was too dark to see the posts.

"Q. Do you know what it was that struck Simpson? A. I never seen what struck him but I should judge it would be the post. He fell back on us—that is all I know; the only thing that could strike him."

In cross-examination he was asked:

"Q. You were not paying any particular attention at the time to anything that occurred? A. No, we never dreamed of anything happening. We were just talking and laughing there.

"Q. The first thing you knew was when Simpson fell over? A. Yes.

"Q. You did not feel any jolt or any swing, or anything of that sort? A. No; just fell right back.

"Q. Your way of accounting for it is to suppose there was a swing or a jolt? A. I do not know; we were sitting there, and he fell back on us—that is all I know."

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He also said that at the time they were passing over a curve, but he could not or did not identify the locality of the curve or otherwise in any way define the locality of the accident.

Mabel Farrell said she was sitting at the back of the car where the plaintiff was; the fourth from where he was standing.

"Q. Then what happened? A. I do not remember. I was sitting at the back of the car. I saw Mr. Simpson fall back. I do not know what struck him. I do not remember what struck him; it was kind of dark and my back was kind of turned to him."

No one was called to prove the position of the trolley poles along the track, and, indeed, except inferentially, and as much from the questions as from the answers, there was really no evidence that there were such poles. And there certainly was a total absence of any kind of evidence to prove or from which it might reasonably be inferred that there was a trolley pole so near the track as to have caused the injury.

Under these circumstances, at the close of the plaintiff's case, which consisted of the evidence to which I have referred, counsel for the defendants moved for a judgment of nonsuit, when this took place:

"Mr. Moss: I move for nonsuit. I submit there is no evidence of any negligence of any kind.

"His Lordship: Why not?

"Mr. Moss: In what way?

"His Lordship: A man riding along on a street car gets hit by something. I should think it was a clear case of negligence of some sort.

"Mr. Moss: In this case, if he was struck by a trolley pole, the plaintiff knows the poles are there. He has ridden over there for weeks and years, and he knows it is a dangerous thing to stick his head over.

"His Lordship: That would be contributory negligence, and that would have to go to the jury.

"Mr. Moss: If that is your Lordship's view.

"His Lordship: I should not think the thing was arguable at

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all. Is a man liable to get his head knocked off every time he puts it outside of a street car?

"Mr. Moss: If he puts it out the wrong side.

"His Lordship: Either side he puts his head out?

"Mr. Moss: He might strike a waggon.

"His Lordship: If you shew he struck a waggon?

"Mr. Moss: There is no evidence before your Lordship to shew he struck a pole?

"His Lordship: *I know, but he struck something.*

"Mr. Moss: There might be any obstacle there that might strike him, and we cannot guarantee that he won't be struck by either passing objects or falling objects, or anything of that sort. The plaintiff has to shew some negligence to bring the accident home to us in some way.

"His Lordship: You will have to go farther than this court."

And thereupon several witnesses were examined on behalf of the defendants, and, among others, a civil engineer, Mr. Green, and a Mr. Wilson, an officer of the defendants. Mr. Green, apparently acting on the definition of the locality of the accident given by the plaintiff in his examination for discovery, deposed that he had made an examination and measurement of each trolley post from the store at the Humber westerly for about one-third of a mile, and he produced and proved a plan shewing the exact situation as he found it. From this plan it appears that the nearest post to the track on the north side is distant three feet six inches, and that the clearance, after allowing for the overhang of the car over the rail, would be two feet.

As reliance was placed both at the trial and in the Divisional Court upon Mr. Wilson's evidence as having eked out the meagre case of the plaintiff, it may be useful to set out exactly what he said upon the question of the posts, the only real point in the case. Mr. Wilson said:

"Q. Have you examined systems in other districts? A. Yes.

"Q. What do you say as to the distance of three feet six inches for the trolley pole from the outside of the track? A. That is standard construction.

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"Q. What about one foot six overhang for the body of the car? A. That is less in most cases. We have new cars out on that line at the present time which have a greater overhang than that—up to one foot nine and a half inches—and our snow plough is two feet three and a half inches overhang.

"Q. Has there been any change in the location of the poles in this region since the accident? A. No, sir. Some of the curves,—when we purchased our snow plough a year ago, in making a trial, we found it necessary to move back some of the poles to allow for the overhang.

"Q. Whereabouts would that be? A. I cannot pick out the exact pole, but it was along; there were some between Sunnyside and the Humber, two or three there; there were twenty-four poles moved in the six miles; there were two or three by the Humber.

"Q. Which side of the Humber? A. Between Sunnyside and the Humber; the east side of the Humber.

"Q. I am speaking of the west side? A. There was nothing there inside of what we call Mr. Hicks' reverse curve going up the hill—possibly half a mile or three-quarters of a mile from this point.

"Q. What point? A. From the point of the Humber."

Cross-examined by Mr. Loftus:

"Q. What caused you to move those poles? A. The fact that the rotary plough we purchased is wider than any car we have, and it interfered, in going around the curve, with the pole, as it had a large hood, a hopper on the front for taking up the snow, which is very wide.

"Q. How much wider than a car is this plough? A. It is a foot wider.

"Q. And that interfered with the post? A. On certain curves.

"Q. It extends six inches out on each side further than the car? A. No, on one side.

"Q. You said it was a foot wider? A. Yes, on one side. I am speaking of the cross-section of the car. It is over ten feet wide, the whole plough.

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"Q. You say this is two feet wider than the car? A. I do not know the exact measurement, but it is pretty near that."

In reply, the witness Thompson was recalled, and was allowed, in answer to counsel for the plaintiff, to state that the accident took place half a mile west of the Humber, thus, for a very obvious purpose, materially shifting to the west the *locus in quo* as defined by the plaintiff. This was not properly evidence in reply at all, and should not, if objected to, have been received. The place of accident was a necessary part of the plaintiff's case, and all his evidence on the subject should have been given in the first instance. The plaintiff himself had, as before pointed out, in his examination for discovery, defined the locality, and the defendant's evidence was quite naturally and properly directed to meet and cover the ground thus defined. Objection of a kind was taken to the evidence, but only after the improper question had been asked and answered:

"Mr. Moss: I think this witness was all over this.

"His Lordship: I thought he said that in chief.

"Mr. Moss: I do not understand he said half a mile west of the Humber—it was west of the Humber."

He had not, in fact, so far as the printed case shews, said a word in his former evidence as to where the accident occurred, whether east or west of the Humber; the nearest attempt at definition having been his statement that at the time the car was going round a curve. At the close of the whole case defendants' counsel renewed his motion for a nonsuit, which was again refused, and the case submitted to the jury without questions. A general verdict was rendered for $500 damages in favour of the plaintiff, for which he has judgment.

The view of the facts in evidence taken by the learned trial Judge will best appear from the following extract from his charge: "What was it that the plaintiff hit his head against? The plan produced shews that all the trolley poles west of Nurse's are on the north side of the track. It was on the north side of this car that the plaintiff was standing when he was struck. The defendants say it could not have been, or, in all likelihood, it was

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not, one of our trolley poles, because they are such and such distance from the track. You heard the figures given by the engineer, and you may take the plan with you when you retire; the distances are marked upon it. The exact location of the accident is in doubt. If the evidence of the conductor is to be accepted, the man was not hurt till after they left Nurse's, coming east. If the evidence of those who saw the man fall is to be accepted he was hurt some distance west of the Humber stopping place at Nurse's. You may consider that it is not at all unreasonable that the plaintiff and those who were sitting near him could not locate the point of accident with much certainty. Doubtless, when he received this injury and fell upon their laps, their attention would be directed to him and to his injuries, and the only way they could form a judgment as to how far west of Nurse's—of the Humber—that the injury occurred would be, first, to be able to form some estimate of the length of time that the car took to reach Nurse's from the point of injury and the speed at which the car was travelling. With their attention directed upon this man and the injury he had received, would they be in a position to tell with any exactness at all either the length of time that elapsed or the speed at which the car was running? It may be that this accident took place at a point farther west than shewn upon this diagram. It is a matter of uncertainty as to where the accident did occur. Whether the poles farther west than this plan are located entirely or principally upon the north side of the track, or whether they are near or farther from the track, we have no positive statement except the statement of Mr. Wilson as to the number of poles west of the point in question that they had to remove last winter, when they found they could not work their snow plough by reason of the poles being too close. Was it a pole his head came in contact with? The danger attendant upon the proximity of the pole does not rest entirely upon the statement that a pole is three feet six, or three feet ten, or four feet, away from the track, and you may have noticed that the engineer who prepared this plan and who spoke of the distances north of the track, was not asked whether these poles all stood

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in a vertical position or not, and a pole might be five feet away from the track, and if it did not stand exactly perpendicular, and if it bent or leaned in the direction of the track, it might be much more dangerous and come much nearer to the body of the car than if it stood only three feet from the track, and stood in an exactly perpendicular position. So that the statement that these poles stood three feet six or three feet eight, without the additional statement that they stood in a perpendicular position, is not of much assistance in deciding the fact whether the poles were, in fact, too close to this trolley car or not.

"Then, if you come to the conclusion that this injury was occasioned by his head coming in contact with the trolley pole, the next question to consider is whether that was a negligent act of this company operating these cars at varying rates of speed, with a pole so close that a man leaning over might strike against it with his head. It is said that they are put at standard distances, whatever that may mean. I do not know that there is any positive rule that requires a company to put their poles near or far from their rails, but I take the responsibility of saying that if a railway company operating electric cars or a railway company operating steam cars place their poles or other obstructions so near to their travelling cars that it might reasonably be expected, in the minds of reasonable men, that passengers would strike their heads against the poles or other obstructions, that that would be negligence. People getting upon these cars are entitled to some reasonable protection. I take the responsibility of saying that if this man were not negligent, as to which I will deal in a moment, and he struck his head against a pole that was so close to this running car that it might have reasonably been expected that a passenger would do what he did in standing in his position, that would be negligence of the railway company."

In the Divisional Court each of the learned Judges gave reasons. Falconbridge, C.J., in his brief judgment, does not deal with the facts, but with the law only. Britton, J., dealt briefly with the facts and at some length with the law. Upon the facts, he said, his opinion was that upon the whole case there was evidence of

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negligence on the part of the defendants proper to be submitted to the jury, and that the nonsuit was properly refused; that upon the evidence the jury could find that the plaintiff's injury was sustained by his head coming in contact with a trolley pole, and that to place a pole in such close proximity to the rails that a person projecting his head in the manner described would come in contact with it was evidence of negligence; that the case was one wholly for the jury, unless it could be held as matter of law that what the plaintiff did was *per se* contributory negligence, which he did not think it was. And he then referred to a number of cases as to that question in support of that view. Riddell, J., was of the opinion that at the close of the plaintiff's case the defendants' motion of nonsuit should have been granted, but that the evidence given on behalf of the defendants had supplied the deficiency. The learned Judge's remarks upon this subject were as follows:—

"Had the defendants rested with the case as presented by the plaintiff, I think the motion for a nonsuit should have been granted. I do not think the facts as established by the plaintiff's evidence shewed even a *primâ facie* case of negligence. They simply shewed that riding on a car of the defendants, and projecting his head a short distance beyond the side of the car, the plaintiff received a blow from some source. There was no evidence that this blow came from a pole or that there was any pole near the track. No doubt, if anything happened to the car itself, such as running off the track, the principle of *res ipsa loquitur* would apply, but there was nothing of that kind here, and I do not think that principle could be extended here so as to throw upon the defendants the means of proving non-negligence on their part.

"But it is not necessary to pursue that inquiry further, as the evidence adduced by the defendants takes the case very much further. It was proved that some months after the accident the defendants, upon trying a snow plough, which projected over the rails one foot, 'pretty near,' further than the car, found it necessary to move back some of the poles to allow for the overhang,

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that this was done on the north side of the track (the accident occurred on the north side), and that about twenty poles had to be moved in the five miles west of Nurse's Hotel; none, as the witness says, however, nearer the Humber than "possibly half a mile or three-quarters of a mile." The plaintiff says he was injured about one hundred yards west of the Humber, but says that his ideas as to where the accident happened are very hazy outside of what his witnesses told him. Thompson says that the accident took place about half a mile the other side of the Humber, so far as he could judge—half a mile west of Nurse's Hotel—and both Thompson and Miss Farrell say the accident took place on a curve. There was ample evidence upon which the jury ought to find—and, had I been trying the case, I should have found—that the accident took place upon the curve, Hicks' curve; that at that point there was a post within one foot, and perhaps much less, of the car, and that this it was which struck the plaintiff's head. The plaintiff's evidence is that his head was projecting three or four inches, though he thinks not five or six or seven inches, and no other cause can reasonably be suggested which would occasion the accident. I do not think this is a mere guess or conjecture."

The learned Judge then proceeded to an elaborate consideration of the cases as to whether it was negligence *per se* on the part of the plaintiff to protrude his head beyond the line of the car as he described, and agreed with the conclusion of the other members of the court that it was not.

My difficulty is not so much with the law as with the facts. It is conceded apparently that it is not one for the application of *res ipsa loquitur*. The plaintiff was bound to give some reasonable evidence to support the case of negligence which he alleged. He says he was struck by a post placed and maintained too near the track for safety, and yet from beginning to end there is absolutely no evidence of such a post having been in existence. If it was there on the night of September 4th, it was there next morning, and also for months afterwards, for no post was removed until long after the action began. In two weeks the plaintiff

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had recovered from the injury. When he resolved to bring an action is not stated, but on November 30th following he issued his writ. The post was still standing then. Surely the most obvious thing to do, if an action was to be brought, was as soon as possible to go over the track and locate the post or a post which did the mischief. He was not then limited as to space. Any post at all near the Humber to the west would have done, and it could have been discovered by merely riding over the track in daylight. And if this did not occur to the plaintiff, it is incomprehensible that he was not so advised by his solicitor. Without some reasonable evidence upon this point, how could the plaintiff hope to succeed? Unless upon the conjecture that there must have been a post because he was struck by something on the forehead. Even the plaintiff himself does not, except inferentially, say the blow was from a post. He saw no post nor did any of his witnesses, nor do they know what struck him. The line was not a new one. It had been in operation for years, and many thousands of passengers had, doubtless, passed over it in that time, and no similar accident had ever happened before. This negative fact may prove little, but it certainly made it none the less the duty of the plaintiff to come into court with the necessary evidence to prove the whereabouts and position of the post which he alleges injured him.

In the course of the learned Judge's charge, a juryman very pertinently asked how the plaintiff could from his position be struck in the forehead instead of on the side of the head, to which his Lordship replied it would depend on the angle at which he was holding his head as to where he came into contact with whatever he was struck by. With this explanation the juryman was, I suppose, satisfied, for there is no word of a dissenting juror. Now, then, if one may conjecture, why may not another? The blow on the forehead was certainly, under the circumstances, very peculiar. Why may not one conjecture that it was caused by his fall? The only thing that is clear is that he fell from some cause. Is it not quite as probable that in falling among the uncushioned seats he struck his forehead, as that he was struck by

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a post, which no one has found or apparently tried to identify? The blow, wherever it came from, rendered him unconscious, and it would be no extraordinary thing that the plaintiff would not, on recovering consciousness, be aware of exactly what had hit him. He had, he admits himself, had some beer and some whiskey out of a flask, and he was also smoking a cigar, to which he was not, any more than to the drinking, accustomed, according to his evidence. The car was proceeding rapidly, and a lurch around a curve, with one in the plaintiff's condition and position, might very reasonably account for his fall, without a blow at all, and the fall itself might very well account for the bruised forehead. But, in truth, conjecture, at least on the side of the plaintiff, is out of the question. The exact fact, if it is a fact, could have been proved with very little care. The defendants cannot be held liable except upon reasonable evidence of some definite thing which caused the injury, an element wholly lacking in the case. Mabee, J., in his charge, suggests that the place of the accident is indistinct, that the accident may have taken place further west than the evidence shews, or that some post, although far enough distant at the base, may have inclined towards the track far enough to cause the injury. These suppositions are, with deference, pure conjectures. There is no evidence of a slanting pole, and the plaintiff is surely bound within reasonable limits by his own statement as to where the accident took place. Riddell, J., evidently proceeding upon the evidence of Wilson, reached the conclusion, not of a slanting post, but the more positive one of an actual post in Hicks' curve, placed within one foot, and probably less, of the car, and that this it was which caused the injury. All I can say, and I say it with the greatest deference, is that a most careful perusal and re-perusal of the evidence contained in the printed case has utterly failed to shew me a word of evidence to justify such a conclusion. Waiving all objection to the admissibility of Mr. Thompson's evidence in reply, accepting his guess in the dark as implicitly as if he had measured the distance with a surveyor's chain, but also taking, as in fairness must be done, the evidence given by Mr. Wilson, which, it is thought by Riddell,

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J., helped the case of the plaintiff over the stile, it is perfectly clear that no post whatever was removed for over half a mile west of the Humber, the distance covered by Thompson, in his evidence in reply, which completely seems to dispose of the theory of Riddell, J., that the post in question was one of those removed by Wilson.

There was no case proper for the jury until the plaintiff established, either by direct evidence or by reasonable inference, the existence of a post which could have caused the injury. Of direct evidence there is not a particle, nor is there, in my opinion, unless upon the application of the principle of *res ipsa loquitur*, any evidence from which the necessary inference could reasonably be drawn, with the result that the plaintiff's action fails, and should be dismissed with costs. And the plaintiff should pay the costs of this appeal.

MOSS, C.J.O., and OSLER and MACLAREN, JJ.A., concurred.

MEREDITH, J.A.:—I am unable, by any fair process of reasoning, to bring my mind to the conclusion that this case might properly have been withdrawn from the jury; indeed, the more it is considered, the firmer becomes my first impression that, if the case had been tried by me, I would have reached the same conclusions as those reached by the jury upon all the questions of fact affecting the defendant's liability, except, perhaps, that of contributory negligence.

That the defendants were guilty of actionable negligence, in the placing of some of the poles along their track, seems to me not only obvious, but to be fully admitted by two of their officers, in their evidence at the trial. One of such witnesses—James McDougall—testified for the defendants that he was quite familiar with the mode of construction of such roads on this continent; and that the common distance of the poles from the nearest rail is three feet six or three feet seven. The other of such witnesses —Charles L. Wilson—likewise testified that, according to "standard construction," such distance is three feet six. The defendants'

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poles generally seem to have been placed in accordance with this rule or standard; but it was, after the plaintiff's injury, discovered that about twenty-five of them had been misplaced at a less distance, and they were then removed to the proper distance. The negligent placing of these poles within the standard distance seems to have been discovered, or, at all events, brought effectually home to the defendants, by one of their cars—the snow plough—coming so violently in contact with one of such poles that the car was thrown from the track and the pole snapped in twain. As this car is but one foot wider on each side than the car in which the plaintiff was when injured, it is obvious that this particular pole was an offender against the rule as to distance to a considerable extent, for, to bring about the results which followed the collision, the car must have overlapped the pole at least several inches, or there would have been "give" enough in each to have averted such violent consequences. When it is remembered, among other things, that the only way of boarding or alighting from some of the defendants' cars is at the side, and that the only means of passing from one part of the car to another by the defendants' servants, or by passengers when necessary, is by means of the stage or foot board at the side, it will be very obvious that some standard or safe distance for placing poles is necessary. This part of the case presents no sort of difficulty.

But it is said that there was no evidence that such negligence was the cause of the plaintiff's injury; that the plaintiff testified that he was struck "about one hundred yards the other side of the Humber," and that the evidence for the defence proved that there was no such misplaced pole within a quarter, or a third, of a mile of that side of the Humber. That, however, is very inconclusive; that was not all that the plaintiff said on the subject; and if it had been, it would not prevent a finding to the contrary; a plaintiff is not estopped by any such statement as that; it may have been a mistake; and it is quite open to a jury to give credit to or to discredit such a statement, there being other evidence which might fairly lead them to a different conclusion. But that was, as I have said, by no means all that the plaintiff

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said on the subject. In his cross-examination, Mr. Moss elicited this addition to it:

"Q. Your ideas about where the accident occurred are very hazy now? A. Outside of my witnesses, what they told me.

"Q. You could not tell within a quarter of a mile, of your own recollection? A. I knew we were near the Humber, the last I remembered."

* * * * * * *

"Q. On your examination you did not tell us about the drink of whiskey? A. I had just two drinks out of two bottles.

"Q. Your memory is very elusive? A. Anybody got a crack like I did their memory would be bad."

Everyone knows how very difficult it is for anyone, on a dark night, to tell just where he is, even in familiar streets, on looking out of a car, unless he has been looking out for some length of time, and has grasped or kept track of the "bearings." The inclination of my mind would be, as that of the jury, no doubt, was, that it would be safer to depend upon the probabilities of the case, and the testimony of others, than upon the plaintiff's testimony in this respect, and none the less so because, according to his uncontradicted testimony, unconsciousness for three days was the immediate effect of the blow he received.

The other two witnesses for the plaintiff, each of whom was present when he was struck, testified that the injury was caused when the car was running on one of the curves west of the Humber, the witness Thompson saying that it was about a half a mile the other side of the Humber, as far as he could judge; and when asked why he said half a mile and not quarter of a mile, he answered, "I just passed my opinion about it." "It took some little time from the time he was hurt to go to the Humber, and that is how I judge it would be half a mile." The other witness, not unnaturally, was unable to throw any great light on the question, but was, indeed, less definite. She said, "We saw him fall, and a couple of the boys picked him up, and the car did not stop for quite a while after." Upon such evidence, including the positive statement of the plaintiff that he was struck by one of the poles,

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I can find no sort of fault with the jury in "putting two and two together" and easily reaching the conclusion that the proximate cause of the plaintiff's injury was one of the twenty-five poles negligently placed by the defendants too near to the track—within the standard distance. I would have had no difficulty in reaching that conclusion if the case had been tried by me without a jury. The suggestion that the plaintiff was struck by some missile hurled at the car is quite too far-fetched. Such a weapon would probably have caused a cut or wound, not a mere abrasion and bruise, and would probably have fallen in the car and have been heard or seen. Its impetus would hardly be completely spent by the impact with the side of the man's head. Nor can I at all agree with Mr. Hellmuth in his contention that the blow could not have been struck where it was by coming in contact with the pole, as the plaintiff testified that it was. It would all depend upon the way he happened to have turned his head at the moment before the impact. All of these things were essentially questions for the jury; and I have not the conceit to imagine that they were not at least quite as competent to understand them, and to find the very truth of the matter, as I am, having the great advantage, as they had, of hearing and seeing the witnesses, and all, also, that transpires at a trial, which it is impossible and impracticable to convey to a Court of Appeal.

So, too, the question of contributory negligence seems to me to have been one for the jury, in the circumstances of this case. I am unable to say that there is no reasonable evidence to support their finding in the plaintiff's favour upon it. The case of a railway such as this is so obviously different from that of what a short time ago might have been called the ordinary railway, and is now very often called a steam railway, that I would not have mentioned it had not the Divisional Court, failed to make any remark upon the difference in giving their reasons for the conclusion which they reached. For the purposes of the subject under discussion there is quite as much difference between the railway in question and a steam railway as there is between this railway and a horse car railway or even a stage coach.

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Being upon the back platform of the defendants' car, where the plaintiff was when injured, was not only not prohibited, but was invited by the defendants, there being a seat there for passengers, and passengers almost invariably both standing and sitting in such platform, or vestibule, as it is now commonly called. There was nothing to prevent leaning over the rail at the back or at the side; the wire guard at the side was placed so low—three feet seven inches from the floor—as to almost indicate that it is unobjectionable to look out, or to lean over, for any such or other ordinary purposes; and there was no warning of any kind against so doing, or of any danger from it; and it was a thing of the commonest occurrence, no wise objected to so far as the evidence shews. There was, therefore, evidence upon which the jury might, in my opinion, have found that what the plaintiff says he did was a thing permitted to be done by the defendants. Why might not a passenger extend his head over the railing from the rear vestibule of such a car? There were no windows nor anything else whatever to prevent it; there was not the ubiquitous cinder, ever seeking a lodgment in a human eye; there were none of the other obvious dangers attendant upon a protrusion of the head through the window of a car in a fast moving train of an ordinary railway, or of standing upon the platform of such a car contrary to the invariable warning against doing so. I am, therefore, quite in accord with the conclusions of the Divisional Court on this question also.

But I am not in accord with their attack upon the law as laid down in the Massachusetts case, which they saw fit to dissent from. It seems to me to have been quite unnecessary for the proper determination of this case to discuss at all the conclusions of the Court in that case upon this question. But, as they have done so, it seems to me to be proper to say that I am at present quite unable to agree with them in the views they expressed regarding it. I would have thought that no one in the possession of ordinary intelligence would protrude either his head or his heels through the window of a swift moving railway train, which might be

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running at twenty, forty, or sixty miles an hour; that the law of self-preservation would have prevented even those of less than ordinary intelligence or prudence doing so. Car windows are plainly made for no such purpose; and railway companies have a right to assume that those who undertake to travel upon their roads are neither imbeciles nor lunatics with suicidal tendencies. If one has a right to poke his or her head out of the window, or to stand upon the platform, of the cars of such a railway, he or she is, I suppose, entitled to damages for the almost inevitable cinder in the eye consequences; and if entitled to do so with the head, why not with the feet, which may be tired and long for a bit of fresh air too, and so have damages, too, for the stockings, which might lose their lustre through the smuts from the engine or the mist from its steam.

No defence was raised on the ground that the plaintiff was doing an unlawful act in spitting upon the highway, and that that unlawful act was the cause of his injury; and so any such question cannot be considered.

I am, therefore, firmly of opinion that this appeal should be dismissed; and, indeed, in view of the unanimous findings of the jury, entirely approved of by the trial Judge, and unanimously confirmed in the Divisional Court, and in view of the fact that the amount involved is small, that the costs permitted to be incurred must now largely exceed that amount, and of the other evils of protracted litigation in such a case as this, that no appeal to this Court should ever have been brought. It cannot be satisfactory that the costs of an action such as this should be permitted to exceed the amount involved in it, nor that litigation over it should be protracted, nor that either party should eventually succeed upon the opinions of four Judges against the firm opinions of the five other Judges who have heard and considered the case.

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NEGLIGENCE—INSULATION OF ELECTRIC WIRES.

CANADA.] [SUPREME COURT.

QUEBEC RAILWAY, LIGHT AND POWER CO. v. FORTIN.

(40 *S.C.R.* 181.)

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Negligence—Master and servant—Duty of employee—Insulation of electric wires—Onus of proof.

An electric line foreman in the company's employ met his death from contact with imperfectly insulated live wires while at same work in proximity to them in the power-house. The evidence left doubt whether the duties of deceased included the inspection and care of the wires both inside and outside of the power-house, or whether his engagement was to perform the duties in question in respect only to the wires outside the power-house walls.

Held, that the onus of proof as to the point in dispute was on the defendants and, such onus not having been satisfied, they were liable in damages.

Judgment appealed from affirmed, Davies, J., dissenting, on a different view of the evidence in holding that the duties of deceased included inspection and care of the interior wiring.

PRESENT: Sir Charles Fitzpatrick, C.J., and Davies, Idington, Maclennan and Duff, JJ.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, district of Quebec, whereby the plaintiff's action was maintained with costs.

The material circumstances of the case and questions at issue on the appeal are stated in the judgments now reported.

The appeal was heard on February 24 and 25, 1908.

Stuart, K.C., for the appellants.

Alleyn Taschereau, for the respondent.

May 5, 1908. THE CHIEF JUSTICE:—I am of opinion that this appeal should be dismissed with costs.

DAVIES, J. (dissenting):—This action was brought by the widow of the deceased, one Wilfrid Guimont, to recover dam-

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ages from the company for the death of Guimont caused by an uninsulated wire in the power-house of the company, at Montmorenci.

The question as to the liability of the appellant company for the death of the deceased turns entirely upon whose duty it was to see that the wires were sufficiently and properly insulated.

If this was part of deceased's duty as line foreman, then it is quite clear that his death consequent upon his failure to discharge it could not be charged against the company or held to be merely contributory negligence on his part.

In the case suggested his own neglect would be clearly the cause of his death, and of course it could not be contended successfully that a company or employer who engaged a man for the special duty of seeing that dangerous wires transmitting electricity were kept properly insulated could be held liable for his death in case that death was caused by his own neglect of duty.

I have examined and considered the evidence upon the crucial question as to the duty of the deceased with respect to the wires of the company passing into and through the power-house, and, in my opinion, the evidence of Mr. Doddridge, the superintendent of the company, and of Langford, described as the company's master mechanic, leaves no room for reasonable doubt that it was as much the duty of the deceased to inspect and keep in repair the electric wires running into and through the power-house as those parts of the wires outside of the power-house. With respect to the latter his duty was admitted and I think the positive testimony of the officers I have mentioned as to deceased's duty in inspecting and keeping the wires in the power-house properly insulated and repaired and his frequent and regular visits to the power-house for the ostensible purpose of discharging that duty leave no room for reasonable doubt on the point or on his understanding of it.

As the death of the deceased was caused by his negligently passing or attempting to pass under a wire within the power-

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house which had become uninsulated and out of repair and which it was his special duty to keep insulated and repaired, I think the appeal should be allowed and the action dismissed.

IDINGTON, J., concurred with Maclennan, J.

MACLENNAN, J.:—After a very careful consideration of this case I am of opinion that we ought to dismiss the appeal.

The question is whether, upon the evidence, the condition of the wires which caused the death of the plaintiff's husband was due to his own neglect of duty; whether in fact the deceased was the person whose duty it was, as the servant of the defendants, to have inspected the wires and to have repaired their defective condition.

The company have a power-house at Montmorenci Falls, from which they supply light and power to the city of Quebec and other places by means of overhead electric wires.

The power-house contains a very large number of wires, some of them of very high voltage. These or most of them are strung high overhead. A platform, three or four feet wide and fourteen feet above the floor, stretches across from side to side and is only reached by a moveable ladder.

The deceased was foreman of the company's linemen, and was subject to the orders and direction of Mr. Doddridge, the company's superintendent, and of Mr. Langford, their master mechanic. Mr. Doddridge describes his character and qualities as "*splendid,*" and Langford describes him as "a good man," "a man in whom he had every confidence," "a man that knew his business," "a very competent man," "one of our best men."

It is not disputed that his duty was, with the assistance of men under him, to keep the company's wires, outside of the power-house, in order. But the accident having occurred within the power-house, the question is whether he had any duty of inspection and repair over the wires, or those parts of them, which were within the power-house.

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It is in evidence that, about six months before the accident, he had, in obedience to special directions, changed the positions of two wires in the power-house. In their changed position, these two wires crossed the platform, at a considerable angle, and about two and a half feet above it.

On the day of the accident he had been directed to change some other wires and, with an assistant, had climbed the platform, by means of a ladder, to prepare to do the work directed. While passing under the wires, which he had placed six months before, he was killed by contact with one of them and it was found that for about ten inches, immediately over the platform, one or both of the wires had not the usual or any isolation coating upon them. But there is no evidence how that defect had arisen, or how long it had existed.

Several witnesses say that the duties of the deceased were confined to the lines or wires outside the power-house, except when he received special orders, Mr. Doddridge says that he, Doddridge, solely had charge of the linemen, including the deceased, but he does not say that the deceased had any duty of inspection within the power-house.

What he says rather suggests the contrary, he says, he has charge of all the linemen, what we call all *the outside linemen* of all the high tension work, of the main line work, and work around the power-house. The only witness who says that the deceased had any duty of inspection within the power-house is Mr. Langford. He says positively that he had the duty of inspecting the wires within as well as those without the power-house, and to see that they were in good order. In cross-examination, however, he says he did not know whether there was any written agreement with the deceased, and that that would come under Mr. Doddridge's position. "He did not know who engaged the deceased, but he was under Mr. Doddridge," which I take to mean that the duties of the deceased must have been arranged between him and Mr. Doddridge. When pressed whether deceased was obliged to inspect the wires inside the

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power-house, his answer was: "He was engaged as line foreman." Then he says he himself had charge of the power-house, had a mechanic for the power-house who is specially appointed to take care of the power-house, and for the inspection of the different works in the power-house, dynamos, and water-wheels, and that sort of thing.

There is no witness who says he ever saw the deceased do anything in the power-house, during all the six years of his employment, except under special instructions.

I think the proper conclusion is that there is no sufficient evidence that the deceased, as the servant of the defendants, had the duty of inspecting and repairing the live wire which caused his death.

I also think that this conclusion is greatly strengthened by the high character given to the deceased by Doddridge and Langford, his superior officers. It is not to be supposed, without very clear testimony to the contrary, that such a man would have neglected to inspect the wires in the power-house, as well as those without, and to discover and repair the defective and dangerous wire which caused his death, if it had been his duty to do so.

The appeal should be dismissed.

DUFF, J.:—The only point seriously in dispute in this appeal is whether or not the husband of the respondent was entrusted with, as one of the duties of his employment, the responsibility of seeing to the safe insulation of the wires from which he received the shock which caused his death.

On this question the onus was on the appellants and, after a careful examination of the evidence, I agree with the court below that that onus has not been satisfied.

Appeal dismissed with costs.

Solicitors for the appellants: *Pentland, Stuart & Brodie.*
Solicitors for the respondent: *Lavergne & Taschereau.*

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WARRANT FOR POSSESSION—COSTS—PRACTICE.

BRITISH COLUMBIA.] [CLEMENT, J.
[IN CHAMBERS.

RE VANCOUVER, VICTORIA & EASTERN R.W. & NAV. CO. AND MILSTED.

(13 *B.C.R.* 187).

Practice—Costs of application for warrant of possession—Railway Act, 1903, *secs.* 193, 217 *and* 219, *sub-sec.* 1.

Where a railway company under its powers to expropriate land obtained a warrant for possession and the amount awarded the owner in subsequent arbitration proceedings is less than the amount at first offered by the company the costs of obtaining the warrant for possession shall be borne by the owner.

APPLICATION to confirm the taxation of the railway company's costs in an arbitration under the Railway Act respecting right of way where the amount allowed by the arbitrators was less than the amount offered by the company under section 193 of the Act, sub-section (*b*).

Heard before Clement, J., at Chambers in Vancouver on the 27th of September, 1907.

The railway company had applied for and obtained a warrant for possession of the lands prior to the arbitration under section 217 of the Act. The owner objected to payment of the costs of obtaining the warrant, claiming that under section 219, sub-section 1, the costs of obtaining the warrant were only payable by the company under the circumstances mentioned in said sub-section, and that the owner was under no liability under any circumstances to pay such costs. The taxing officer allowed them to the company and the owner appealed.

Sept. 27, 1907.

Brydone-Jack, for the owner.

Reid, for the company.

CLEMENT, J., confirmed the taxation following *Re Shibley and Napanee Tamworth & Quebec R.W. Co.* (1889) 13 P.R. 237.

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LANDS—POSSESSION—MANDAMUS.

MANITOBA.] [MATHERS, J.

CARR v. CANADIAN NORTHERN R.W. CO.

(17 *Man. L.R.* 178).

Contract—Sale of land—Statute of Frauds—Part performance by taking possession—Mandamus—King's Bench Act, Rule 879.

1. A written offer to sell land on certain terms, accompanied by an intimation that, if the purchaser takes possession, the vendor would treat that act as an acceptance of the offer, and the subsequent taking of such possession, without further communication with the vendor, together constitute a binding contract of purchase and sale of the land, which is taken out of the Statute of Frauds by that act of taking possession, such act being in itself a part performance of the contract, as well as an essential in the making of it.
Carlill v. *Carbolic Smoke Ball Co.* (1893), 1 Q.B. 256, followed.
2. If there had been no contract between the parties respecting the land taken by the defendants for their right of way, the plaintiff would have been entitled to the alternative relief claimed by way of mandamus to compel the defendants to proceed to have the compensation determined under the provisions of the Railway Act.
3. Relief by way of mandamus may now, under Rule 879 of the King's Bench Act, be obtained by an action.
Morgan v. *Metropolitan Railway Co.* (1868), L.R. 4 C.P. 97, followed.

ARGUED: September 28, 1907.
DECIDED: October 18, 1907.

ACTION for specific performance of an agreement or, in the alternative, for a mandamus to compel the defendant to proceed to settle the compensation due the plaintiff, under the terms of the Railway Act.

S. J. Rothwell and *H. P. Blackwood,* for plaintiff, cited Anson, 11th ed., 30; Pollock, 655; *Wilson* v. *West Hartlepool,* 34 Beav. 187; *Bodwell* v. *McNiven,* 5 O.L.R. 322; *London, etc., R.W. Co.* v. *Winter,* Cr. & Ph. 57; *Barrett* v. *C.P.R.,* 16 M.R. 549; *McKenzie* v. *G.T.R.,* 9 O.W.R. 778; *Wicher* v. *C.P.R.,* 16 M.R. 343; and *Saunby* v. *London Water Commissioners* (1906), A.C. 110.

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O. H. Clarke, K.C., for defendants, cited *Morgan* v. *Milman*, 3 DeG. M. & G. 35; *Re Ruttan*, 12 O.L.R. 187; and *Kingston* v. *Kingston*, 25 A.R. 462.

October 18, 1907. MATHERS, J.:—The plaintiff is the owner of the south-east quarter of section 28 in township 10, range 26, west of the first principal meridian, in the Province of Manitoba.

This land is situate close to the town of Virden. Early in July, 1905, the defendant company had constructed their line of railway northward from Hartney to the southerly boundary of the plaintiff's land. It had apparently not been the original intention of the railway company to enter upon the plaintiff's land at all, but to terminate the railway just south thereof. It was, however, ultimately decided to build across the plaintiff's land and up to the right of way of the Canadian Pacific Railway.

On or about 9th July the company opened negotiations with the plaintiff, through their right of way agent, for the purpose of obtaining possession of the necessary land for the construction of their railway across his farm. The plaintiff refused to give possession until the terms of sale of the right of way were settled and determined. The plaintiff and the company's agent could not definitely agree upon all the terms, and finally the plaintiff handed to the agent a written statement of the terms upon which he would sell and permit the defendants to take possession for the purpose of constructing their road. These terms, so far as necessary to state them here, were, first, that the company were to be responsible for damage for trespassing or straying cattle in consequence of their interfering with the fences; the company to put up proper railway fences in due course; the price for the land taken to be $125 per acre; the company to put in a level crossing when required to do so by the plaintiff at the point he should indicate; the defendants to pay damage for the crop then growing upon the land, and to pay the plaintiff's solicitors' costs in connection with the business, and finally that the whole matter be completed within two months of the time when possession was given, and interest at 6 per cent. to be paid after two months from the completion day.

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At the time these terms were handed to defendants' right of way agent, the plaintiff notified him that if the defendants took possession of the land he would understand from that act that the company accepted and agreed to his terms. A few days after this, and without any further communication with the plaintiff, the company took possession, and proceeded to and did complete the construction of the railway across plaintiff's land, and it was not until some two weeks afterwards that the plaintiff became apprised, by the receipt of a letter from the right of way agent, that the company did not propose to abide by the terms stated. Considerable negotiation then took place, the plaintiff contending that the company, by taking possession, had accepted his terms and thereby made a binding agreement between them, and the defendants refusing to admit that such was the effect of their action. As the parties did not succeed in coming to any terms, this action was brought for specific performance of the agreement, or, in the alternative, for a mandamus to compel the defendants to proceed to settle the compensation coming to the plaintiff under the terms of the Railway Act.

At the time the company took possession they had not filed the plans and book of reference required by the Railway Act. It is reasonably clear, I think, that if the company did not enter pursuant to an agreement made with the plaintiff, they were trespassers: MacMurchy & Denison's Railway Act, p. 213; *Sandon* v. *White*, 35 S.C.R. 309; *Wicher* v. *Canadian Pacific R.W. Co.*, 16 Man. L.R. 343, 5 West. L.R. 44, 6 Can. Ry. Cas. 181; *Mason* v. *South Norfolk R.W. Co.*, 19 O.R. 132. It will not be assumed that the defendants meant to commit a trespass; but it will be assumed that the company, having entered into possession of the plaintiff's land, knowing that he would interpret that act as an acceptance of the written terms of sale delivered to the right of way agent, meant to thereby consummate a contract with the plaintiff on those terms.

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An offer may be accepted by an act or by conduct. An acceptance is consummated when it is made in a manner prescribed or indicated by the offerer: Anson on Contracts, p. 30. "I suppose there can be doubt that when a person, in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated mode of acceptance": per Bowen, L.J., in *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 265.

I must, therefore, hold that the company, by taking possession of the plaintiff's land, accepted the plaintiff's offer and thereby became bound by a contract in the terms of that offer.

It was contended on behalf of the defendants that, even if the taking possession did consummate a contract, the Statute of Frauds was a bar to the plaintiff's action, because the contract was not in writing; that the act of defendants in taking possession could not be referable to the contract, because it required the taking of possession to bring the contract into existence; and consequently there was no such part performance as took the case out of the statute. The company did take possession and have ever since continued in possession of this land. If the defendants' argument were carried to its logical conclusion, the plaintiff could never succeed on this contract as against the defendants, because, although the company had possession of his land, and had agreed with him to comply with his terms, yet he could never sue them because the contract was not in writing and there was no such part performance as would take the case out of the Statute of Frauds. I cannot accede to this argument. The contract has been partly executed on the plaintiff's part by permitting the defendants to take possession. It has also been partly executed on the defendants' part, as they have taken possession and occupied the land. Their doing so can only be referable to a contract. I think, therefore, that the plaintiff is entitled to succeed on this branch of his case, and it only remains to determine the amount he is entitled to recover.

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The quantity of land taken, .89 of an acre, at $125 an acre, would be $111.25. The defendants took possession on 13th July. They were to pay interest after two months from that date. Interest from 13th September to the commencement of the action would be $2.40. The plaintiff's crop damage was $16.20, but he was only entitled to one-third of the crop, a tenant being entitled to two-thirds. The plaintiff's one-third would be $5.40. The damage to a cow from defective fencing, $3, is not covered by the contract, and cannot be recovered. Solicitors' costs incurred by the plaintiff in connection with the business, $16.97. Total, $136.02.

As to the last item, it was argued that when the contract was made there were no solicitors' costs, and therefore none can be recovered. The solicitors' costs referred to in the offer are the costs incurred by the plaintiff in carrying out the contract, and there was evidence that the amount claimed had been so incurred.

Before the commencement of the action the plaintiff notified the defendants that he wanted the level crossing placed at the extreme north end of their line, adjoining the Canadian Pacific Railway Company's right of way. The company have fenced, and there is no complaint on that score. They have not, however, supplied the level crossing. The plaintiff is entitled to a declaration of his right to a level crossing at the point indicated.

There will be judgment for the plaintiff for $136.02 and interest since beginning action, and an order directing the defendants to construct a level crossing at the point indicated, and costs of suit.

If a contract had not been made between the parties, I am of opinion that the plaintiff would have been entitled to the alternative relief claimed, by way of mandamus to compel the defendants to proceed to have the compensation determined under the provisions of the Railway Act. That this relief may be obtained by action is sufficiently established by such cases as

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Morgan v. *Metropolitan R.W. Co.*, L.R. 3 C.P. 553, affirmed, L.R. 4 C.P. 97, and *Guest* v. *Poole Bournemouth R.W. Co.*, L.R. 5 C.P. 553. The prerogative writ of mandamus was applied for summarily, and it was to this prerogative writ that Moss, J.A., referred in *City of Kingston* v. *Kingston, etc., R.W. Co.*, 25 A.R. 462, when he expressed the opinion that it ought to be invoked by motion, and doubted if it could be awarded in an action. Under King's Bench Rule 879, it would appear that the normal mode of procedure for a mandamus is now by action.

TARIFF—SPECIAL PASSENGER RATES—APPROVAL.

BRITISH COLUMBIA.] [LAMPMAN, Co.J.

GRAND LODGE OF KNIGHTS OF PYTHIAS v. GREAT NORTHERN R.W. Co.

(*See* 6 *West. L.R.* 425).

Railway—Contract for special passenger rates for delegates to convention—Breach—Validity of contract—Standard passenger tariff not filed and approved—Railway Act—Construction—Recovery of amount overpaid.

A railway company agreed with a lodge to give reduced excursion rates, provided a certain number took advantage of them; but these rates were not approved by the Board of Railway Commissioners under the Railway Act, 1906, sec. 331. On the return trip the railway company refused to grant the reduced rate and collected full fare. In an action to recover the amount overpaid,

Held, (following *Lees* v. *Ottawa & New York R.W. Co.*, 31 O.R. 567) that notwithstanding the absence of approval of the rate under sec. 331 of the Railway Act, the amount overpaid could be recovered.

ACTION to recover $126.70, paid by plaintiffs for railway fares in addition to the amount properly payable under a contract with defendants, as alleged.

R. T. Elliott, K.C., and *Morphy*, for plaintiffs.

R. L. Reid, K.C., for defendants.

Jan. 31, 1908. LAMPMAN, Co.C.J.:—In May last the Grand Lodge of the Knights of Pythias held a convention in Nelson,

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and with a view to arranging for transportation of those delegates who would attend from Victoria, Mr. Pferdner, the secretary, saw Mr. Stephen, the Great Northern agent at Victoria, and he communicated with the assistant general passenger agent in Seattle. The result was that the defendants agreed, if the attendance at the convention was 100 or more, to give a rate of one first-class fare for the round trip.

It was arranged that the full fare should be paid in Victoria, and a receipt issued according to a standard form supplied by the company; the delegate kept the receipt, and on the back of it there was a blank certificate shewing his attendance at the convention, and on his producing the receipt to the Nelson agent and the certificate signed by Mr. Pferdner, he was to get a ticket for Victoria without payment. There was no dispute about the fact that over 100 attended, or that the Victoria delegates complied with all the requirements of the agreement, but the Nelson agent refused to issue the return tickets, and from each of the seven delegates who went over the Great Northern, he collected $18.10, or $126.70 in all, and this amount the Grand Lodge refunded to the delegates, as it pays the fares of delegates attending the convention.

Mr. Reid, for the defendant company, said that the reason they did not carry out their contract was because to have done so would have exposed them to a penalty of $1,000, under section 398 of the Railway Act, inasmuch as the company's standard passenger tariff had not been filed with the Board of Railway Commissioners and approved by it.

Section 331 of the Railway Act provides that "a standard passenger tariff shall be filed, approved, and published in the same manner as required by this Act in the case of a standard freight tariff. 2. Until the company files its standard passenger tariff and such tariff is so approved and published in the *Canada Gazette,* no tolls shall be charged by the company."

Based on this section Mr. Reid contended that the contract was illegal, and hence the plaintiffs cannot maintain their action, and he cited several cases in support of his contention.

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I should be very sorry if I should have to give effect to this contention and let the defendant company escape from the swindle perpetrated on the plaintiffs. If the defendants had been possessed of any inclination to act fairly with the plaintiffs, they would have found a way out of their difficulty, but from the facts disclosed before me I am not satisfied that it was fear of incurring a penalty that promoted them to break their agreement. They had agreed to charge in effect nothing for the return trip: they charged $18.10, a rate admittedly not approved by the Board, so how they escaped the liability to a fine I fail to see. On their own shewing they were liable to a fine if they charged nothing or if they charged $18.10; the whole result seems to me to be that if they carried out their agreement they lost $18.10 per passenger, and if they refused to carry out their agreement they would gain $18.10 per passenger. It looks to me as if they broke their agreement because they thought it would pay better to break it. I am glad to see that the defendants' general agent at Victoria was averse to the course adopted, as appears from his letter of May 6, to the assistant traffic manager in Seattle.

It appears that the standard passenger tariff was not filed and approved as required by sec. 331, but Mr. Elliott refers to sec. 341 of the Act, and contends that the contract sued on was permitted by sub-sec. (*b*) of that section, which is as follows: "341. Nothing in this Act shall be construed to prevent,—(*b*) The issuing of mileage, excursion or commutation passenger tickets, or the carriage at reduced rates of immigrants or settlers and their goods or effects, or any member of any organized association of commercial travellers with his baggage."

The transaction here was a contract to give an excursion rate, and would include an implied term to issue an excursion ticket or something equivalent to it, and hence the transaction is within the provisions of sub-sec. (*b*), and, according to the first words of the section, there is nothing in the Act to prevent it. True, sec. 331 says that until the standard passenger tariff

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is approved and published no tolls shall be charged, but I do not think that the provisions of sec. 341 become effective only after the requirements of sec. 331 have been complied with, and I am fortified in this view by what Meredith, C.J., says in delivering the judgment of the Divisional Court in Ontario in *Lees* v. *Ottawa and New York R.W. Co.*, 31 O.R. 567. The old Railway Act, 51 Vict. ch. 29, sec. 227, enacted that "no tolls shall be levied or taken until the by-law fixing such tolls has been approved of," etc. The plaintiff had frequently travelled by the railway, and, as the tolls had not been approved, he brought an action to recover the sums he had paid. It was held that he could not recover, and the Chief Justice said (although the Act at that time had no provision similar to the present sec. 341), at p. 571: "It is plain, I think, that the theory upon which the action to recover back the moneys paid by the respondent was brought cannot be supported. To give effect to it would be to hold that a company whose tariff has not been sanctioned by the Governor-General must not carry on its business, and is not at liberty even to make special contracts with persons who may be desirous of using the railway for the purpose of travel or for the carriage of goods, for the service which is desired, and that if it does so, though the service is performed and the charge made for it, which has been paid, is a reasonable one, the person who has got the benefit of it may recover back what he has paid, and for such a proposition I can find no warrant in the provisions of the Act."

The result is that the defendants must pay the plaintiffs $126.70 and interest thereon at the rate of 5 per cent. per annum from 15th July last, and the costs of the action.

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PASSENGER TOLLS—THIRD-CLASS FARES.

CANADA.] [SUPREME COURT.

GRAND TRUNK R.W. CO. v. ROBERTSON.

(39 *S.C.R.* 506).

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Present—Sir Charles Fitzpatrick, C.J., and Girouard, Idington, Maclennan and Duff, JJ.

Grand Trunk Railway of Canada—Passenger tolls—Third-class fares—Construction of statutes—Repeal—16 Vict. ch. 37, sec. 3 (Can.)—Amendments by subsequent railway legislation.

The legislation by the late Province of Canada and the Parliament of Canada since the enactment of sec. 3 of the statute of Canada, 16 Vict. ch. 37, in 1852, has not expressly or by implication repealed the provisions of that section requiring third-class passenger carriages to be run every day upon the line of the Grand Trunk Railway of Canada, between Toronto and Montreal, on which the fare or charge for each third-class passenger shall not exceed one penny currency for each mile travelled.

APPEAL from an order of the Board of Railway Commissioners for Canada, reported 6 Can. Ry. Cas. 495, directing that the Grand Trunk Railway Company of Canada should run every day throughout the length of its line, between the city of Toronto, in the Province of Ontario, and the city of Montreal, in the Province of Quebec, at least one passenger train having in it third-class carriages for passenger traffic, and that the fare or charge for each third-class passenger by such train on said portion of the company's railway should not exceed two cents for each mile travelled, and that the company should, forthwith, file passenger tariffs for that portion of its railway embodying said rate.

Special leave for the appeal was granted, in the order appealed from, by the Board of Railway Commissioners.

The circumstances of the case are fully stated by the learned Chief Commissioner Killam in his judgment delivered at the

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time of the making of the order appealed from. Reported in 6 Can. Ry. Cas., pp. 495 *et seq.*

October 28 and 29, 1907. *Wallace Nesbitt,* K.C., and *D. L. McCarthy,* for the appellants. We submit that section 3 of 16 Vict. ch. 37, has been repealed by 46 Vict. ch. 24, sec. 12, which substitutes a new provision in the place of sub-section 6, of section 17, of the Consolidated Railway Act, 1879, expressly authorizing the alteration and variation of the tolls by the special Act authorized to be taken. The words "subject to the provisions and limitations in the special Act contained" evidently refer to the requirements of the special Act relating to machinery. They cannot refer to the tolls themselves, as otherwise they would nullify the whole section. Quite apart from the section the railway company could have varied their tolls within the range set by the special Act. The only object of the section must have been to enlarge this range. The learned Chief Commissioner suggests that the Act of 1879 does not apply to the appellants and that, consequently, 46 Vict. ch. 24, sec. 12, being an amendment to that Act, likewise failed of such application. Section 2 of the Act of 1879, provided that, amongst others, the section amended by this section (12) should apply to every railway constructed "under the authority of any Act passed by the Parliament of Canada," which may, perhaps, be said to exclude the appellants, but, by section 6 of the same Act, their railway was declared to be a work for the general advantage of Canada, and sub-section 2 of this section goes somewhat farther and seems to amount to an enactment bringing the railways mentioned in sub-section 1 within the railway legislation of the Dominion. Sub-section 3 of the section certainly bears out that conclusion and is difficult to explain on any other basis. See also 47 Vict. (D.) ch. 11. sec. 1.

The sections which then follow relate to a large number of details of the general railway legislation, and amend a number of the sections of the Consolidated Railway Act, 1879, which

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originally applied only to railways "constructed or to be constructed under the authority of any Act passed by the Parliament of Canada"; so that, apparently, the understanding of the Dominion Parliament, in 1884, was that the application of these sections had then become extended to include all railways within the legislative authority of the Dominion. It is true that the section introduced in 1883 by 46 Vict. (D.) ch. 24, sec. 12, was modified and its application changed. But if the effect of 16 Vict. ch. 37, sec. 3, was thus annulled, the repeal of the later statute would not again give effect to the earlier one. Hardcastle on Statutes (3 ed.), p. 319, and R.S.C. (1906), ch. 1, sec. 19.

In the second place we contend that the operation of 16 Vict. ch. 37, sec. 3, is excluded by the operation of section 6 of the present Railway Act, R.S.C. 1906, ch. 37.

The appellants' railway is declared to be a work for the general advantage of Canada by 46 Vict. ch. 24, sec. 6. As to 16 Vict. ch. 37, being a special Act, see R.S.C. (1906), ch. 37, sec. 2, sub-sec. 28, and as to its being passed by the legislature of a province, see R.S.C. (1906), ch. 37, sec. 2, sub-sec. 20. To see the full force of section 6, R.S.C. (1906), ch. 37, compare it with section 3 of the same Act, under which where the railway is incorporated by special Act of the Parliament of Canada, precisely the contrary rule is to prevail.

In the third place we contend that the operation of 16 Vict. ch. 37, sec. 3, is likewise excluded by the operation of the present Railway Act, taken as a whole; that, in other words, there is a repeal by implication of the provisions of the earlier special Act by those of the later general Act.

For the authorities bearing on the question of the repeal of a special Act by implication, see *Bramston* v. *Colchester*, 6 E. & B. 246; *Great Central Consumers Gas Co.* v. *Clarke*, 11 C.B. (N.S.), p. 838; *Daw* v. *Metropolitan Board of Works*, 31 L.J.C.P. 223; *Duncan* v. *Scottish North-Eastern R.W. Co.*, L.R. 2 H.L. Sc. 20; *Charnock* v. *Merchant* (1900), 1 Q.B. 474; *In re the Duke of*

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Marlborough's Parliamentary Estates, 8 T.L.R. 179; *Brown* v. *McMillan,* 7 M. & W. 196; *Luckraft* v. *Pridam,* 6 Ch. D. 205; *Re Cuckfield,* 19 Beav. 153; *Stuart* v. *Jones,* 1 E. & B. 22; *Regina* v. *Bridge,* 24 Q.B.D. 609; *Goodwin* v. *Sheffield* (1902), 1 K.B. 629; *Parry* v. *Croydon Commercial Gas & Coke Co.,* 15 C.B.N.S. 568; *Mersey Docks & Harbour Board* v. *Lucas,* 51 L.J.Q.B. 114, at page 116.

When the present Railway Act is examined, provisions are found quite inconsistent with the provisions of the earlier statute. An elaborate scheme for the regulation of the tolls of all railways is set forth in sections 314 to 339. Sections 269 and 284 also provide for the regulation of the accommodation to passengers. Sections 26 and 30 amongst others give the widest powers to the Board to enforce the provisions of the Act. We find in the Act a general uniform system of regulation of tolls and accommodation and complete machinery provided for enforcing the same. This is surely inconsistent in intention and in fact with the rigid special requirements of 16 Vict. ch. 37, sec. 3. We submit most strongly that the present case falls within the principle of the authorities above cited and that the earlier special Act must be taken to be impliedly repealed by the later general provisions.

As regards the requirements in 16 Vict. ch. 37, sec. 3, with regard to the running of third-class carriages, it is to be observed that, if the requirement as to tolls falls, the requirement as to third-class carriages necessarily falls also. The classes are distinguishable, under the statute, only by the tolls. There is nothing in the statute requiring them to be labeled in any particular way. It is quite open to the appellants, once the difficulty as to tolls is removed to say: "We regard our 'Pullman' cars as first-class, our first-class as second-class, and our second-class or our smokers as third-class carriages."

We submit that that portion of 16 Vict. ch. 37, sec. 3, is no longer in force, which requires that the fare or charge for each third-class passenger by any train on our railway shall not exceed

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one penny currency for each mile travelled and that at least one train having in it third-class carriages shall run every day throughout the length of the line of the said railway; and that the decision of the Board of Railway Commissioners for Canada is wrong and should be set aside.

Curry, K.C., for the respondent, and *Baily*, K.C., for the Attorney-General of Ontario.

The portion of section 3 of 16 Vict. ch. 37, dealing with the gauge of the railway was expressly repealed by Act of the Parliament of Canada, 36 Vict. ch. 18, sec. 23. The remainder of the section has never been expressly repealed, and it still remains in force, and it has not been impliedly repealed by the provisions of 46 Vict. ch. 24, sec. 12.

The clauses with respect to "tolls" in the Railway Clauses' Consolidation Act, 14 & 15 Vict. ch. 51, were, by section 2 of the special Act made a part of that Act, and the learned Chief Commissioner finds that the clause requiring the running of third-class carriages and limiting third-class fares, was not affected by any legislation prior to the Act of 1903.

The contentions that the operation of 16 Vict. ch. 37, sec. 3, is excluded by the operation of section 6 of the present Railway Act, and by the operation of that Act, taken as a whole, and that there is a repeal by implication of the provisions of the earlier special Act by those of the later general Act are fully answered by the learned Chief Commissioner.

We therefore submit that that portion of 16 Vict. ch. 37, sec. 3, which requires that the fare or charge for each third-class passenger by any train on the railway of the appellants shall not exceed one penny currency for each mile travelled, and that at least one train having in it third-class carriages shall run every day throughout the length of the line of railway is still in force.

Dec. 13, 1907. THE CHIEF JUSTICE:—This appeal is dismissed for the reasons given by Chief Commissioner Killam in the judgment appealed from.

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GIROUARD, J., concurred in the dismissal of the appeal.

IDINGTON, J.:—I agree with the reasoning of the learned Chief Commissioner. It seems to me impregnable. I desire only to add one or two observations arising out of new ground taken by the appellants.

It is claimed before us that the statute, 18 Vict. ch. 33, of the late Province of Canada, and not 16 Vict. ch. 37, is to be looked to as the incorporating Act of the appellant company. It is said, section 4 of that incorporated the Railway Clauses' Consolidation Act as part and parcel of the Act of this latter incorporation and, thus, the special tariff of passenger tolls fixed by 16 Vict. ch. 37, sec. 3, is got rid of.

A careful consideration of the whole of 18 Vict. ch. 33, and even section four thereof relied on itself, does not support this contention.

The general scope and purpose of that Act was to amalgamate a great many lines with that of the main Grand Trunk line, now in question, and the respective companies owning then with the Grand Trunk Railway Company of Canada, incorporated by 16 Vict. ch. 37, and all are to be called the Grand Trunk Railway Company of Canada.

The old order of things remains, in all other respects, unchanged. There is the old corporate body, the old corporate name, the old main line extended, and all under the same old charter with more new powers and properties, but with the old right to provincial subsidy and the corresponding duty to discharge which was imposed as consideration for granting the subsidy.

Again, it is contended here that the Board of Railway Commissioners have, by virtue of the Railway Act of 1903, obtained greater powers over the tolls than had the Governor-in-Council, under the General Railway Clauses' Consolidation Act, 14 & 15 Vict. ch. 15, in force when the appellants became incorporated.

I think a comparison of sub-section 5, of section 14, of that Act with section 251 of the Act of 1902 will shew there is not much ground for this contention.

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Even if clearly so, as I think it is not, what would there be in such a state of things so inconsistent with as to repeal the obligations created by 16 Vict. ch. 37, sec. 3, on which the Board has proceeded to make the order complained of?

Still less argument, if possible, as against the order in question, is there in the new powers of the Board over the kind of cars and accommodation generally to be furnished by the company in operating its lines. Is it to be supposed that the company, if free from any supervision whatsoever, would have persisted to the present hour in using only tallow dips, such as obtainable in 1852, and insisted in depriving third-class cars of all the decencies and utilities for preserving some of the decencies of life, in travelling?

If such be held by the company to be part of its inalienable right, I fear it cannot maintain that precious right in face of this new statute, but, all the same, I have no doubt the Commissioners can and will, if it become clearly part of their duty to give directions as to third-class cars, properly discriminate between the several classes of cars each class of fare may entitle a passenger to enter. They may possibly improve them all a bit as compared with 1852 without hurting any one or even the company.

I think the appeal should be dismissed with costs.

MACLENNAN, J.:—After a full and careful consideration of the legislation enacted during the many years which have elapsed since the passing of the special Act of 1852, and the reasons and arguments which were addressed to us on behalf of the appellants, I am of opinion that the appellants have failed to shew that the enactment in question has been repealed either expressly or by implication.

I agree with the very full statement of reasons for judgment given by the Chief Commissioner of the Railway Board, and cannot usefully add anything thereto.

I would dismiss the appeal with costs.

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DUFF, J., concurred in the reasons stated by the Chief Commissioner Killam for the judgment appealed from.

Appeal dismissed with costs.

W. H. Biggar, for the appellants.
James W. Curry, for the respondent.

Special leave to appeal has been granted by the Privy Council.

HIGHWAY CROSSINGS—COST OF PROTECTION.

ONTARIO.] [MABEE, J.
[COURT OF APPEAL.

CANADIAN PACIFIC R.W. CO. v. CITY OF TORONTO.

(*Unreported.*)

Constitutional law—Railways—Crossings—Railway Act of Canada, 1888 *—Powers of Railway Committee of Privy Council—Protection by means of gates and watchmen—Contribution to cost of—Municipal corporation—Highways constructed before railways—Highways not within municipality.*

Until 31st December, 1901, the defendants paid their share of the cost of protecting certain level crossings in and about the city of Toronto pursuit to the order of the Railway Committee of the Privy Council dated 8th January, 1891, and then ceased from making further payments.

Held, 1. In an action brought to enforce payment, that the defendants were concluded by the authority of decided cases.

In re Canadian Pacific R.W. Co. and *County & Township of York*, 27 O.R. 559, 25 A.R. 65, 1 Can. Ry. Cas. 36, 47.

City of Toronto v. *Grand Trunk R.W. Co.*, 37 S.C.R. 232, 5 Can. Ry. Cas. 138.

2. That the order of the Railway Committee was valid and binding until rescinded by the Board of Railway Commissioners.

ACTION tried at Whitby before Mabee, J., on 19th June, 1906.

Angus MacMurchy, for the plaintiffs.
Fullerton, K.C., for the defendants.

The facts and cases cited appear in the judgment.

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October 3, 1906. MABEE, J.:—The plaintiffs claim to recover from the defendants $4,677.11, being the proportion that it is alleged the city is liable to pay towards the maintenance of gates, etc., of certain city streets crossed by the plaintiffs' line of railway. The liability arises under orders of the Railway Committee of the Privy Council dated January 8th, 1891, and December 16th, 1893, both of which were made rules of Court on the 28th day of February, 1895. The plaintiff company provided the gates and watchmen as ordered, rendered the defendants from time to time proper accounts of the expenses connected with their compliance with these orders, and the defendants paid their share each year pursuant to the order, down to December 31st, 1901, since which date they have paid nothing, although accounts were regularly rendered.

The defendants plead that the streets in question were highways prior to the construction of the plaintiffs' line of railway, that the Railway Committee had no authority or jurisdiction to order or direct the defendants to pay any portion of the costs of protecting such crossings, and that these orders are not binding upon the defendants. It is also pleaded that the clause or clauses of the Railway Act purporting to give the Committee power to make orders such as those in question are *ultra vires* of the Parliament of Canada, and the notices provided for by section 60 of the Judicature Act were duly served. In the sixth paragraph of the statement of defence it is alleged that the Bathurst Street and Dufferin Street crossings are not within the municipality of the city of Toronto, and the Avenue Road crossing "was not within the municipality of the city of Toronto until the 10th of March, 1905."

The following admissions were signed by counsel:—

1. The line of the Canadian Pacific Railway runs along part of the north limit of the city of Toronto, and at its intersection with Dufferin and Bathurst Streets mentioned in the order of the Railway Committee in question in this action, the south limit

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of the railway lands is the north limit of the city of Toronto, and the protection order is upon a portion of the highway in the township of York. The intersection of the said line of railway with Avenue Road was, at the date of the said order of the Railway Committee, and still is, wholly within the city of Toronto.

2. Dufferin and Bathurst Streets and Avenue Road run from south to north through the city of Toronto, or part thereof, and these continue northward through the township of York and adjacent townships of the county of York, and are public roads or highways under the jurisdiction of, and maintained by, the different local municipalities in which the parts thereof respectively lie, that is to say, as to the parts in question here, by the township of York, as to the Dufferin and Bathurst Streets intersections, and by the city of Toronto, as to Avenue Rd. intersections.

3. Dufferin and Bathurst Streets are highways laid out by the original Crown survey, and, with Avenue Road, were all in existence as highways prior to the construction of the plaintiffs' railway.

4-5. Accounts have been rendered, as stated in the sixth paragraph of the statement of claim, the amount of which is not disputed, and the said accounts are unpaid at this date. By the said accounts, the amount of $2,135.65 related to the Avenue Road crossing, the amount of $1,261.65 to the Bathurst Street crossing, and the amount of $1,279.81 to the Dufferin Street crossing.

No evidence was given upon the hearing, and by consent, a brief was handed in subsequent to the trial shewing various applications made to the Railway Committee and to the Board of Railway Commissioners, in connection with these orders. The fact that the defendants adopted or acquiesced in these orders by making payments for several years does not appear to be signed admissions, but it was alleged by counsel during argument, and not denied, that the defendant had paid all the sums claimed by the plaintiffs as payable by them, from the date of the orders down to December 31st, 1901.

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In 1904 the township of York (that municipality being a party to the orders of January 8th, 1891, and December 16th, 1893) made an application to the Board of Railway Commissioners to rescind or vary the foregoing orders; all parties concerned appeared and the matter was argued at great length. This application was, on May 16th, 1906, dismissed, and the order dismissing that application was made a rule of the High Court on May 19th, 1906.

I am of opinion that the defendants are concluded by authority upon all the points raised by them as reasons why they should not continue paying under these orders, indeed, it was arranged at the hearing that I should delay judgment until the defendants had an opportunity to move in the Privy Council for leave to appeal from the judgment of the Supreme Court in the *Grand Trunk Case,* which motion I am advised was made, but without success. Holding the opinion that the questions in issue have all been resolved against the defendants, no good would be accomplished by an expression of my views upon these issues.

Cases governing are: *Perrault* v. *Grand Trunk R.W. Co.*, 36 S.C.R. 671, 5 Can. Ry. Cas. 293; *In re Canadian Pacific R.W. Co. and County and Township of York,* 27 O.R. 559, 25 A.R. 65, 1 Can. Ry. Cas. 36, 47; *City of Toronto* v. *Grand Trunk R.W. Co.*, 37 S.C.R. 232, 5 Can. Ry. Cas. 138; *Canadian Pacific R.W. Co.* v. *Grand Trunk R.W. Co.*, 12 O.L.R. 320, 5 Can. Ry. Cas. 400.

There must be judgment in favour of the plaintiffs for $4,677.11 together with interest from the dates at which the various amounts were due and payable by the city, with costs of suit.

The defendants appealed to the Court of Appeal.

The appeal was heard 1st February, 1907.

Fullerton, K.C., for appellants, repeated his argument in *City of Toronto* v. *Grand Trunk R.W. Co.*, 37 S.C.R. 232, 5 Can. Ry. Cas. 138.

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The city's so-called application merely called the attention of the Railway Committee to the necessity for protection at the crossings. It was not a consent to the order of the Committee. The statute provides the procedure and what the Committee may order.

The Municipal Act does not authorize any expenditure of money for such a purpose.

If the Committee have power to impose any cost on the municipality, it can only be when the highway is being carried across the railway and payment of the cost is imposed as a condition to the crossing being made.

In all the cases provided for in the order the highway existed prior to the railway.

Two of the crossings are outside the city limits. The city has no municipal or other jurisdiction over these highways at the points where protection has been ordered, and is not liable therefor.

Even if the Committee have power to order protection and to order payment therefor, it has no power to order the municipality to recoup the railway company for such protection.

Such payment is properly made by the railway company. Parliament and its creature the Railway Committee have power to order the railway company to pay, but re-payment by the municipality is not "incidentally necessary" to such protection, and the order is *ultra vires*.

The payment ordered to be made by the municipality is in effect a tax imposed on the municipality by Parliament to the advantage of the respondents.

Even if imposed for the advantage of the municipality, such payment of tax would be *ultra vires*.

The clear line of distinction, it is submitted, between this case and the cases relied upon by the respondents, is, that although protection at railway crossings may be "incidentally

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necessary" the railway company is liable to pay therefor, but there is no necessity to seek re-payment from anybody of such liability.

Angus MacMurchy, for respondents, besides relying on the authorities cited in the judgment appealed from, contended that the order of the Board confirming the orders of the Railway Committee was final, and that any question as to the jurisdiction of the Board should be raised by an appeal to the Supreme Court. Railway Act, 1903, section 44 (3) and (9). *Perrault* v. *Grand Trunk R.W. Co.,* 36 S.C.R. 671, 5 Can. Ry. Cas. 293; *Canadian Pacific R.W. Co.* v. *Grand Trunk R.W. Co.* 12 O.L.R. 320, 5 Can. Ry. Cas. 400; *Montreal Street R.W. Co.* v. *Montreal Terminal R.W. Co.,* 35 S.C.R. 478, 36 S.C.R. 369, 4 Can. Ry. Cas. 369, 373.

April 22, 1907. Moss, C.J.O.:—The orders of the Railway Committee of the Privy Council, as constituted under the provisions of the Railway Act of 1888, and amending Acts, upon which the plaintiffs are maintaining this action, were for several years treated and acted upon by the defendants as valid and binding upon them.

These orders were pronounced upon applications made by the defendants to the Railway Committee for protection at the crossings at rail level of the three highways in question, viz., Dufferin and Bathurst Streets and Avenue Road. The plaintiffs provided the protection ordered and the defendants paid their share of the expense down to the end of 1901.

The orders were in force at the time of the passage of the Railway Act, 1903, and by virtue of section 33 they continue in force until repealed, rescinded, changed or varied under the provisions of that Act. In 1906 upon an application made by the township of York of which the defendants were notified and upon the hearing of which they were represented, the Board of Railway Commissioners constituted under the Railway Act, 1903,

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dealt with and treated the orders as valid and subsisting and refused to rescind or vary them.

The plaintiffs are therefore entitled to have them enforced according to their terms unless the other defences set up are an answer to the claim. But they appear to be disposed of by decisions binding upon us and it would be but needless repetition to again traverse the grounds which are fully covered by them. They determine adversely to the defendants' contentions and must be accepted as governing the case in this Court.

The appeal must be dismissed with costs.

OSLER, J.A.:—I am clearly of opinion that the judgment at the trial should be affirmed.

1. The questions in dispute are really covered by our decision in the case in *Re Canadian Pacific R.W. Co. and the County and Township of York* (1897), 25 A.R. 65, 1 Can. Ry. Cas. 47, approved by the Supreme Court in *City of Toronto* v. *Grand Trunk R.W. Co.*, 37 S.C.R. 232.

2. The orders of the Railway Committee of the Privy Council of 1891 and 1893 were confirmed and validated by the 33rd section of the Railway Act, 1903, subject to be repealed, rescinded, changed or varied by the Board of Railway Commissioners under the provisions of that Act and in the year 1906 an application made by the township of York to rescind or vary the order of the Railway Committee of 1891 was dismissed by the Board.

So long, therefore, as that order stands the defendants must comply with it and pay their proportion of the cost of maintaining the gates in question.

MEREDITH, J.A.:—This case is governed by that of *In re Canadian Pacific R.W. Co. and York*, in this Court, 25 A.R. 65, and that of *Toronto* v. *Grand Trunk, etc.*, in the Supreme Court of Canada, 37 S.C.R. 232. They are all quite the same in principle. The fact that the territorial limits of the city of Toronto did not extend beyond the southerly limit of the land of the railway com-

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pany, and that their power over the highway in question ends there, cannot deprive them of interest in a source of great danger to persons travelling upon the highway but a few yards beyond that part of it which is vested in them, and with the keeping of which in repair they are charged. If, instead of the railway, there were a pit or a precipice there, could it be said that they had no duty to protect those lawfully using the highway against its danger? That, because it happened to be in the next parish, they were not concerned, in any way, with that danger? The road, over which they have control, is a paved invitation to the public to use it up to almost the very point of greatest danger; and up to lesser, but still considerable, danger before passing beyond their limits. We are not concerned in the extent of their interest, but that they have a substantial interest in the safety of that level crossing seems to me indisputable, unless indeed they can, and until they do, stop up the highway at their limits. It is a case of doing that, or adopting some other means of protecting traffic upon the highway either going out of or coming into the city, the highway being an invitation to use it each way. Whether the railway company, or the railway company and the other corporation, should pay the whole of the cost of necessary protection, or the bulk of it, is not a question for consideration here. The appellants are interested, and that is all that need be determined.

I would dismiss the appeal.

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CITY OF TORONTO v. CANADIAN PACIFIC R.W. CO.

[(1908) *A.C.* 54.]

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

British North America Act, 1867, *sec.* 91, *sub-sec.* 29, *sec.* 92, *sub-sec.* 10(*a*)—*Dominion Railway Act of* 1888, *secs.* 187 *and* 188 *intra vires*—*Interpretation Act* (*R.S.C.*, 1886, *ch.* 1) *sec.* 7, *sub-sec.* 2—*Construction*—"*Person.*"

The Railway Committee of the Privy Council of Canada, by order made under secs. 187 and 188 of the Dominion Railway Act (51 Vict. ch. 29), directed certain measures to be taken for safeguarding the respondents' railway, which is a through railway, and for the protection of the public in traversing it at certain level crossings where it passes across public streets at points within or immediately adjoining the boundary of the appellant city, and directed the cost thereof to be borne in equal proportion by the railway and the city.

In a suit by the railway after the execution of works as directed to recover the apportioned amount from the corporation,

Held, that secs. 187 and 188 were *intra vires* of the Dominion Legislature by force of the British North America Act, 1867, sec. 91, sub-sec. 29, and sec. 92, sub-sec. 10(*a*).

Held, also, that, having regard to sec. 7, sub-sec. 2, of the Interpretation Act (R.S.C., 1886, ch. 1), "person" in sec. 188 includes a municipality.

APPEAL from a judgment of the Court of Appeal for Ontario (April 22, 1907), affirming a judgment of Mabee, J. (October 3, 1906), in favour of the respondents.

By an order of the Railway Committee of the Privy Council of Canada (January 8, 1891), the respondent company was ordered to provide gates and watchmen at certain level crossings, to wit, at Bathurst and Dufferin streets and at Avenue road, mentioned in the said order; and it was further directed that one-half of the costs attending the placing and maintaining of the gates and watchmen be contributed by the appellants. The object of the order was to protect the public from accidents in the operation of the respondents' railway system.

The question raised was whether this order, so far as it im-

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posed liability on the appellants in respect of the costs of protecting the crossing, was valid and binding on the appellants. This involved the question whether sections 187 and 188 of the Dominion Railway Act, 1888, under which the order was made, were *intra vires* of the Dominion. Section 187 authorized the Railway Committee, in the case of a railway constructed across any street or other public highway, at rail level or otherwise, to "require the company to which such railway belongs, within such time as the said committee directs, to protect such street or highway by a watchman, or by a watchman and gates or other protection."

Section 188 is as follows: "The Railway Committee may make such orders and give such directions respecting such works and the execution thereof, and the apportionment of the costs thereof and of any such measures of protection between the said company and any person interested therein, as appear to the Railway Committee just and reasonable."

The respondents sued to recover from the appellants the apportioned amount of their liability for works executed by the respondents under the above orders of the Railway Committee. The appellants contended that sections 187 and 188 were *ultra vires* of the Dominion Parliament.

MABEE, J., held that the case was governed by *In re Canadian Pacific R.W. Co. and County of York* (1896), 27 O.R. 559; (1898), 25 A.R. 65; and *City of Toronto* v. *Grand Trunk R.W. Co.* (1906), 37 S.C.R. 232, and decreed the suit.

The Court of Appeal affirmed this decision.

Sir E. Carson, K.C., *Fullerton,* K.C., and *W. N. Tilley,* for the appellants, contended that it was *ultra vires* the Dominion to enact legislation under which they could be charged for work either for a railway or a municipal purpose. They admitted that the respondents' railway was a work within the legislative jurisdiction of the Dominion, but submitted that the appellants were governed by provincial legislation. They could only be

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authorized to spend moneys for purposes directed by provincial legislation. They were not liable to be directed by the Dominion to contribute moneys for any purpose. Reference was made to the Consolidated Municipal Act of Ontario, 1903 (3 Edw. VII. ch. 19, secs. 599, 600, 601, 606, sub-sec. 1 and sec. 611), as containing the only provincial legislation bearing on the subject, and it was contended that any liability imposed thereby did not apply in the case of a Dominion railway. The appellants are not liable to be taxed in aid of the respondents under any legislation, nor was it incidentally necessary to the carrying out of the railway that they should be. Further, the corporation is not a "person interested" within the meaning of section 188. Reference was made to *Attorney-General for Ontario* v. *Attorney-General for Canada* (1896), A.C. 348, 359.

Sir R. Finlay, K.C., *A. R. Creelman,* K.C., and *Geoffrey Lawrence,* for the respondents, contended that section 91, sub-sec. 29, of the British North America Act gave to the Dominion exclusive jurisdiction over this railway. Consequently sections 187 and 188 of the Railway Act, 1888, and the corresponding sections of the Railway Act of 1903 are *intra vires* of the Dominion Parliament as being ancillary to through railway legislation, notwithstanding that they affect civil rights. Reference was made to *Grand Trunk R.W. Co.* v. *Attorney-General for Canada* (1907), A.C. 65; *Madden* v. *Nelson and Fort Sheppard R.W. Co.* (1899), A.C. 626; *Tennant* v. *Union Bank of Canada* (1894), A.C. 31, 45, 47. Dominion legislation, where it is valid, is of paramount authority, even though it trenches on matters assigned to the province. The appellants are persons interested within the meaning of section 188 of the former Act and section 47 of the later Act; see also Interpretation Act (R.S.C. 1886, ch. 1), sec. 7, sub-sec. 2, according to which "person" includes municipality. The orders of the Railway Committee and of the Board which succeeded it under the later Act are final, and bind the appellants: see *Williams* v. *Adams* (1862), 2 B. & S. 312; the Railway Act of 1903, sec. 33; and sec. 144 of the Act

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of 1888. Reference was also made to *City of Toronto* v. *Grand Trunk R.W. Co.*, 37 S.C.R. 232; *In re Canadian Pacific R.W. Co. and County of York*, 25 A.R. 65; *Ottawa Electric R.W. Co.* v. *City of Ottawa* (1906), 37 S.C.R. 354.

Fullerton, K.C., replied.

November 18, 1907.

The judgment of their Lordships * was delivered by

LORD COLLINS:—The question on this appeal is as to the liability of the appellants, the corporation of the city of Toronto, to pay a share of the cost of certain protective measures ordered by the Railway Committee of the Privy Council of Canada for the purpose of safeguarding the public in traversing the respondents' railway, and the railway itself, at certain level crossings where it passes across public streets at points within or immediately adjoining the city boundary. At two of the crossings the Southern boundary of the railway is the Northern boundary of the city. In the third the crossing is wholly within the city.

The order of the Railway Committee, which was dated January 8, 1891, and purported to be made under the 187th and 188th sections of the Dominion Railway Act, 1888 (51 Vict. ch. 29), directed that gates and watchmen should be provided and maintained by the railway company at the said crossings, and that the cost thereof should be borne in equal proportions by the railway company and the corporation. Some two years later there was a slight re-adjustment of the proportions, but nothing turns on this. The corporation continued to pay the adjusted proportion without complaint down to 1901, when they disputed liability and ceased payment. Hence this action, in which the railway sued the corporation to recover the apportioned amount. No question arises as to the amount, if liability is established, but the appellants contend that the sections under which the order was made were *ultra vires* of the Dominion Parliament, and that

*Lords Robertson and Collins, Sirs Arthur Wilson, and Alfred Wills.

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even if they were *intra vires* the corporation did not fall within the words "any person interested therein" in section 188, and could not, therefore, be made liable to pay any apportioned share of the expenses. Mabee, J., the trial Judge, decided against the corporation, on the ground that the point was concluded by cases decided in Canada binding upon him, and his judgment was affirmed by the Court of Appeal for Ontario.

First, with regard to the question of *ultra vires*. There is no doubt that "railways connecting the province with any other or others of the provinces" are expressly excepted from the jurisdiction of the provinces and placed under the exclusive jurisdiction of the Parliament of the Dominion by the Imperial statute, 30 & 31 Vict. ch. 3, the British North America Act, 1867, sec. 91, sub-sec. 29, and sec. 92, sub-sec. 10(*a*). On the other hand, by section 92 of the same Act, municipal institutions in the province and property and civil rights in the province are placed under the exclusive power of the provincial legislature. Questions of conflict between the two jurisdictions, that of the Dominion and that of the province, have frequently come before this Board, and the result of the decisions is thus summed up by Lord Dunedin in delivering the judgment in the most recent case, *Grand Trunk R.W. Co.* v. *Attorney-General for Canada* (1907), A.C. 65, at p. 68. He treats the following propositions as established:—

"First, that there can be a domain in which provincial and dominion legislation may overlap, in which case neither legislation will be *ultra vires* if the field is clear; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the dominion legislation must prevail."

In the present case it seems quite clear to their Lordships that if, to use the language above quoted, "the field were clear," the sections impugned do no more than provide reasonable means for safeguarding in the common interest the public and the railway which is committed to the exclusive jurisdiction of the legislature which enacted them, and were, therefore, *intra vires*.

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If the precautions ordered are reasonably necessary, it is obvious that they must be paid for, and in the view of their Lordships there is nothing *ultra vires* in the ancillary power conferred by the sections on the Committee to make an equitable adjustment of the expenses among the persons interested. This legislations is clearly passed from a point of view more natural in a young and growing community interested in developing the resources of a vast territory as yet not fully settled than it could possibly be in the narrow and thickly populated area of such a country as England. To such a community it might well seem reasonable that those who derived special advantages from the proximity of a railway might bear a special share of the expenses of safeguarding it. Both the substantive and the ancillary provision are alike reasonable and *intra vires* of the Dominion legislature, and on the principles above cited must prevail, even if there is legislation *intra vires* of the provincial legislature dealing with the same subject-matter and in some sense inconsistent. But it seems to their Lordships that in truth there is no real inconsistency, and both may stand together. The through railway is a subject-matter excepted out of the jurisdiction of the province, and there is no express provision in the British North America Act defining the jurisdiction of the province inconsistent with the right vested in the Dominion to provide for the safeguarding of the subject-matter thus excluded from the jurisdiction of the province. The jurisdiction conferred over property and civil rights in the province is quite consistent with a jurisdiction specially reserved to the Dominion in respect of a subject-matter not within the jurisdiction of the province. The rights in the highways conferred on the municipality by the sections of the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19 (Ontario), cited in the appellants' case, do not, in their Lordships opinion, help the appellants at all on the *ultra vires* point, though they bear strongly against them on the point that they are not "persons interested."

With regard to this latter point, it is clear from sec. 7, sub-

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sec. 2, of the Interpretation Act, R.S.C. 1886, ch. 1, cited by Sir R. Finlay, that the word "person" includes a municipality; and their Lordships fully concur in the conclusion and reasoning of Meredith, J.A., in the Court below, that in this case the municipality was a person interested. It is not necessary to say anything upon the other points argued.

Their Lordships will, therefore, humbly advise His Majesty that the appeal be dismissed.

The appellants will pay the costs of the appeal.

Solicitor for appellants: *Freshfields.*

Solicitors for respondents: *Blake & Redden.*

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THROUGH RATES—CONTINUOUS ROUTE.

CANADA.] [BOARD OF RAILWAY COMMISSIONERS.

CANADIAN NORTHERN ONTARIO RY. CO. v. GRAND TRUNK AND CANADIAN PACIFIC RY. COS.

(*Muskoka Rates Case, No.* 875).

Facilities for passenger business—Through rates—Joint tariffs—Continuous route—Competitive and non-competitive points—Railway Act, secs. 317, 333 *and* 334.

The Canadian Northern Ontario Railway Company applied to the Board for an order under section 317 of the Railway Act, directing the Grand Trunk and the Canadian Pacific Ry. Cos. to provide facilities for passengers desiring to travel from or through points on the lines of the respondent companies, or either of them, to points on the lines of the applicant and its connections and to issue tickets at through rates accordingly, the application covering points in Canada and the United States.

The object of the application was to oblige the respondent companies to transfer to it at Toronto passengers desiring to reach the Muskoka district which is served by the lines of the three companies. The applicant has no connections east or west of Toronto, but Toronto may be reached from the United States by steamer from the Niagara frontier during the summer months.

As to competitive points: *Held*, (1), that it has not been shewn that any "obstruction is offered to the public desirous of using such railways as a continuous line of communication" within sub-section 4 of section 317.

(2) That the arrangement between the respondents has not been shewn to constitute an undue or an unreasonable preference as against the applicant nor to be to the public disadvantage.

(3) That a change for the pecuniary benefit of the applicant is not, of itself, a sufficient reason for granting the application.

Without deciding that section 317 *applies only to non-competitive points*: *Held*, (1), that joint fares and rates should be established on joint traffic from non-competitive points destined to points common to the applicant's and respondents' lines.

(2) That the other requests in the application should be refused.

Hearing at Ottawa on 23rd April, 1908, before the full Board.

The facts are above and hereafter stated.

Geo. F. Macdonnell, for the applicant. This application is to compel the respondents to issue through tickets at through rates from all points on their lines to all points on the line of the applicant by any junction the passenger wishes to take. The applicant issues through tickets from any point on its line to any

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points on the respondents' lines at any junction the passenger chooses. The respondents issue no through tickets to the applicant. The respondents have a reciprocal arrangement with each other by which a passenger may start from any point, whether it is a common point on the two railways or not, and go to any other point and they issue through tickets to each other. The applicant is excluded from this arrangement and is given no facilities of that kind.

The application is based upon section 317 of the Railway Act on two grounds. First, the right of the passenger to the greatest facilities that a railway company or combination of railway companies can give him in travelling from his starting point to his destination. The most essential facility is a through ticket at a through rate. Section 317, sub-section 4, covers this. Second, the arrangement between the respondents from which the applicant is excluded, discriminates against the applicant and is contrary to section 317, sub-section 3 (*a*).

The applicant also asks that the respondents be directed to allow any American line which wishes to issue a through ticket to any passenger desiring to travel from Toronto by its line, to do so. The Board has no jurisdiction over American railways, but if they are willing to issue through tickets the Board can compel the respondents to join in giving these facilities to the public and the applicant.

A. R. Creelman, K.C., and *E. W. Beatty*, for the respondent, the Canadian Pacific Railway Company. As to the American branch of the application this has always been a matter of agreement between the railways. There is nothing in the Railway Act which enables compulsory measures to be made. American railways only make such arrangements with Canadian railways which connect with them. A ticket will not be issued for a Canadian railway from a frontier point, but tickets are issued in the United States by an American railway to the frontier, and as the respondent railways connect at the frontier a continuous ticket is given. The American railways will not issue a ticket

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enabling passengers to get off its railway and get on a railway entirely disconnected with it at the frontier.

The Board can only deal with the question as it is affected by the provisions of the Railway Act.

As to the Canadian branch of the application. If section 317, sub-section 3(*a*), is applicable, a declaration that there is an unjust preference will not assist the applicant. Sections 333 and 334 give power to the Board in a proper case to order a joint tariff, which is the applicant's proper remedy if any grievance exists. The application is not based on the public advantage. It is a pure question of the applicant's getting a share of the business that the other two companies have in the Muskoka district. The applicant's line does not go east or west of Toronto. It has no connections and no business to give to the respondents, but the respondents have an immense zone within which to exchange business. It is merely a question of the revenues of the three companies. The public is being amply served by the existing arrangement. We are entitled to the advantage of our haul unless the public interest demands that we should be compelled to hand over our business at Toronto to the applicant.

W. H. Biggar, K.C., and *M. K. Cowan,* K.C., for the respondent, the Grand Trunk Railway Company. Section 317 does not say that the receiving line can compel us to give it the traffic when we carry it ourselves to the same point. The point was decided in *Little Rock & Memphis Ry. Co.* v. *East Tennessee, Virginia and Georgia Ry. Co.,* 3 I.C.C. Rep. 1. Practically the same conclusion is reached in the *Great Western Ry. Co.* v. *Severn & Wye & Severn Bridge Ry. Co.,* 5 Ry. & Canal Tr. Cas. 170, upon sub-section 8 of section 11 of the Regulation of Railways Act, 1873, practically re-enacted by sub-section 9 of section 25, the Railway and Canal Traffic Act, 1888. The contention of the applicant is that, notwithstanding we have a line of our own, have originated all the traffic and cultivated it for years, that we should hand it over to a competing line to carry it to a point where we can carry it ourselves. This is most unreasonable and is not contemplated

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by the Railway Act. With regard to the tickets sold in the United States, the applicant asks the respondents to honour tickets sold by an irresponsible ticket agent whom they may choose to appoint. If we are bound to honour the tickets we have the right to say who shall sell them and be responsible to us for the money they collect. This is not unreasonable.

As to through rates and joint tariffs: see *Chicago and Milwaukee Electric Ry. Co.* v. *Illinois Central Ry. Co.*, 13 I.C.C. 20.

Geo. F. Macdonnell in reply. The cases cited by Mr. Biggar relate to freight, and are not applicable to passenger cases. The passenger has the right to choose his own route, and the agent who sells him the ticket may use all legitimate means to induce him to travel by a particular line of railway.

May 25, 1908. THE CHIEF COMMISSIONER:—At the conclusion of the argument, I was of the opinion that the Canadian Northern Ry. Co. was entitled to relief as to non-competitive points only, and this view has been strengthened by a further consideration of the case and is shared in by the Chief Traffic Officer.

It does not seem to me to be a reasonable proposition that one railway company should be at liberty to use the Act for the purpose of diverting to its line traffic that has been originated only at great expense and trouble by another railway or other railways, without at least shewing a great preponderance of convenience to the public. It must be borne in mind that this application comes from the railway company, and no evidence was given that any inconvenience was being caused to the public from existing conditions, or that there would be any appreciable advantage to the public if the change asked for was granted; and that the change would be for the pecuniary benefit of the applicant railway company is not of itself any sufficient reason for granting the application. Under section 317, the facilities to be afforded are to be reasonable; the preference or advantage that would be given, or the delay or difference in treatment

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that may be permitted, is not to be unreasonable; so it is apparent that the whole section is intended to provide for the establishment of fair and reasonable business relations. Is it fair that the applicant should be permitted to make use of the Act to divert from the lines of the Grand Trunk and Canadian Pacific Railways at Toronto the tourist traffic that the last mentioned railways have spent years in developing? That this would be to the advantage of the applicant is clear, but it has not been shewn that the public is to any appreciable extent interested. I agree with the argument of the applicant that the physical situation of the railways falls within sub-section 4; but it has not been shewn that any "*obstruction is offered to the public desirous of using such railways as a continuous line of communication.*" I do not agree with the contention that existing conditions must be changed merely because a few and inconsiderable number of people might desire to change at Toronto to the applicant's lines; and I cannot regard it as reasonable or proper that railways should, in the application of this section, be put to serious loss and inconvenience when it is apparent that the real object of the application is not to offer greater facilities to the public, but to enhance the earning powers of the applicant's lines.

I do not think upon the facts of this case, having regard to the history of the development of the Muskoka traffic and the location of the lines of the Canadian Pacific and Grand Trunk Railways, not only from the border to Toronto, but from there north to tourist points, that the arrangement between these companies is an undue and unreasonable preference as against the applicant.

It was asked that an order should be made compelling the respondents to allow American lines to issue a through ticket, entitling the passenger to change to the applicant's lines at Toronto for points not reached by the respondents' lines. This, again, is in the interest of the applicant; but it has not been shewn that any public demand exists for such a change, even if the Board could work out such an order by jurisdiction over the

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respondent companies, nor is it sufficient to make any such attempt, that the applicant might develop tourist traffic to points upon its line not reached by the other railways.

I do not base my view upon the construction of the Act that section 317 applies only to non-competitive points, and am not so deciding. Cases might arise where the interests of the public required the application of the section to such places; and in the meantime it is sufficient, for this case, to say that the applicant is not asking for what is fair and reasonable.

I think an order should go requiring the companies forthwith to agree upon and publish joint fares and rates, arranging the proper apportionment thereof, on joint traffic other than that having its origin at Grand Trunk or Canadian Pacific points, or with companies that connect with and deliver to these latter companies and destined to points common to the applicant's and respondents' lines. The other requests contained in the application are refused.

RAILWAY CROSSING—DOUBLE TRACK—PRIORITY.

CANADA.] [BOARD OF RAILWAY COMMISSIONERS.

GRAND TRUNK RY. CO. v. UNITED COUNTIES RY. CO.

(*St. Hyacinthe Crossing Case, No.* 2991.)

Railway crossing—Double track—Priority—Expense of making and protecting crossing—8 *Vict. ch.* 25—14-15 *Vict. ch.* 51, *sec.* 6—18 *Vict. ch.* 33, *Railway Act, sec.* 227—*Senior and junior companies.*

A railway company having the right, under its charter to construct one or more sets of tracks becomes the senior company not only when its line is crossed by the line of a junior company, but also in respect of the crossing of any additional tracks subsequently laid by it, and the junior company must bear the expense of making and protecting all such crossings, as new tracks are laid by the senior company.

Held, that under the circumstances of this case, the United Counties Ry. Co. should bear the expense of protecting the crossing of its line by the intended double track of the Grand Trunk Ry. Co.

Hearing at Ottawa April 22, 1908.

The facts of the case are as follows:—

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The St. Lawrence and Atlantic Railway Company was incorporated on 17th March, 1845, by 8 Vict. ch. 25. It was incorporated as part of the Grand Trunk Ry. Co. by agreement dated 6th April, 1853, confirmed on 18th December, 1854, by 18 Vict. ch. 33. By section 4 of that Act, the Railway Clauses Consolidation Act and the general Railway Clauses Consolidation Act were made applicable to the Grand Trunk Ry. Co. "except so far as the provisions thereof may be varied or are inconsistent with the provisions herein contained." The Railway Clauses Consolidation Act was passed on 15th August, 1851, 14 & 15 Vict. ch. 51, by clause 6 of that Act the railway company "shall have power to make, complete, alter, keep in repair, the railway with one or more sets of rails or tracks to be worked by the force and power of steam," by the interpretation clause of the Railway Clauses Act the word "railway shall mean the railway and works by the special Act to be constructed." The Grand Trunk Railway was constructed in 1853.

By an agreement dated 15th April, 1893, the United Counties Railway Company (subsequently the Quebec, Montreal and Southern Railway Company) were permitted to cross the track of the Grand Trunk Ry. Co., the entire expense of making and protecting the crossing to be borne by the United Counties Ry. Co., the junior road.

Under the terms of this agreement the United Counties Ry. Co. promised to pay the Grand Trunk Ry. Co. $100 per annum, and it was provided "that the amount claimed as compensation for their right of crossing the railway of the Grand Trunk Company is simply mentioned as nominal consideration and named without prejudice to the rights of the said company, should the question arise as to what would be adequate compensation for that privilege, the said Grand Trunk Company reserves the right to raise such question at any time hereafter on giving one month's notice to the said United Counties Company of their intention."

M. K. Cowan, K.C., for the applicant, after stating the admitted facts as above, claimed that the increased cost to the

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Grand Trunk Ry. Co. of carrying on its business occasioned by the crossing should be borne by the junior company under the agreement.

Beique, K.C., for the respondents. The Grand Trunk consented to the United Counties Ry. Co. crossing the only track of the Grand Trunk which then existed on the conditions mentioned in the agreement of 1893, and the order of the Railway Committee of the Privy Council dated 21st March, 1893. The Grand Trunk is the senior road only so far as the track then existing is concerned, but it is not the senior road so far as its second track is concerned. The matter is to be governed by the agreement of 15th April, 1893. The clause relied on by Mr. Cowan has no application here. Although the Grand Trunk, under their charter, have the right to build additional tracks, yet if another company is incorporated in the meantime and actually builds its railway and crosses the only track then in existence, and then 10, 15 or 20 years later the senior company constructs additional tracks, the company which was the junior road at the time the first order was made for a crossing, should not have to bear the expense of protecting the additional tracks laid by the Grand Trunk Ry. Co.

M. K. Cowan, K.C., in reply, referred to the (*Gamebridge Case*), *James Bay Ry. Co.* v. *Grand Trunk Ry. Co.*, 37 S.C.R. 372, 5 Can. Ry. Cas. 164, in which case an appeal from the judgment of the Board was also dismissed by the Governor-in-Council.

April 22, 1908. THE CHIEF COMMISSIONER:—In view of the statutes that have been cited (and indeed Senator Beique admits it) the Grand Trunk at the point in question is the senior road. The facts quite justify the admission. The original incorporation of the ancestor of the Grand Trunk at the point in question in 1845, the agreement of 1853 and the Act incorporating the original road with the Grand Trunk in December, 1854, the introduction in that Act of the Railway Clauses Consolidation Act, and the section of the Railway Act referred to giving the railway company the

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right to lay one or more tracks, the road having been constructed, all make the Grand Trunk the senior road, at any rate down to the date of the agreement of 15th April, 1893, with the United Counties Railway (which was the predecessor of the Quebec, Montreal and Southern Railway) so that there is no manner of doubt that as to the single track the Grand Trunk was the senior road.

I am not able to follow the argument of Senator Beique that there can be seniority as to one track and not as to the other, and the ruling is that the Grand Trunk is senior not only as to the track already constructed, but as to the intended double track.

LOCATION—PRIORITY.

CANADA.] [BOARD OF RAILWAY COMMISSIONERS.

CANADIAN NORTHERN RY. CO. v. CANADIAN PACIFIC RY. CO.

(Kaiser Crossing Case, No. 2458.)

Location—Priority of approval—Registration—Ownership—Construction—Crossing—Seniority—Secs. 157, 159 *and* 160 *Railway Act.*

The map shewing the location and the plan of a branch line of the applicant were approved under sections 157 and 159 and registered as required by section 160, Railway Act, prior to the respondent. The respondent owned in fee the land at the point of crossing of the two locations prior to the approval of any plans. The respondent's line at the point of crossing was built first and the railway was in operation when construction work upon the applicant's railway reached the crossing.

Held, that the respondent was senior to the applicant at the crossing.

THIS application was heard at Ottawa on 5th May, 1908. The facts are stated in the judgment.

G. Ruel, for the applicant.

A. R. Creelman, K.C., and *E. W. Beatty*, for the respondent.

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14th May, 1908. THE CHIEF COMMISSIONER:—The Canadian Northern Railway Company applies for an order for the crossing by its Hartney-Regina Branch over the Wolseley-Reston Branch of the Canadian Pacific Railway Company, and at the same time asks that the order of the Board approving the location of the latter branch be varied. No point, however, was made as to the second application; and the only matter argued was the question as to which of these branches was the senior road.

The plans of the Hartney-Regina Branch of the Canadian Northern were approved by the Board on the 17th of June, 1904, and registered on the 26th of July, 1904. The plans of the Wolseley-Reston Branch of the Canadian Pacific were approved by the Minister of Railways and Canals on the 24th of February, 1905, and registered on the 5th of April, 1905. The approval of the Board was granted on the 18th of July, 1905, and the plans again registered on October 3rd, 1905.

It is argued on behalf of the Canadian Northern Railway Company that the prior approval and registration of the plans of the Hartney-Regina Branch makes the road senior to the Wolseley-Reston Branch of the Canadian Pacific Railway Company.

Construction work upon these two branches commenced at about the same time; but the Wolseley-Reston Branch at the point of crossing which is in question was built first, and that road was in operation when the construction work upon the Hartney-Regina Branch reached the crossing.

The Canadian Pacific Railway Company had, some years prior to the sanction of its plans of the Wolseley-Reston Branch, obtained a patent covering the land at the point of crossing, and that company was the owner of the land at the point in question long prior to the approval of its plans.*

I do not think that the mere approval by the Board of the plans filed with it necessarily gives seniority to the plans first

*NOTE.—In 1901 according to the record.

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approved. Section 159 of the Railway Act defines the effect of approval or sanction, which it is said shall be deemed to be merely approval of the location of the railway and the grades and curves thereof, as shewn in the plan, profile and book of reference, but not to have relieved the company from otherwise complying with the Act; and in granting sanction or approval, the Board is bound by the general location as approved, by the Minister of Railways, and may only sanction a deviation of not more than one mile from any one point on the general location as approved by the Minister.

It seems to me that the railway that is in actual occupation, with an existing work upon the ground, with the ownership of the fee at the point of crossing, has much stronger claims to seniority than the railway which has merely obtained a prior sanction of its plans; and I have no hesitation in holding that the Wolseley-Reston Branch of the Canadian Pacific Railway Company is, at the point in question, senior to the Hartney-Regina Branch of the Canadian Northern Railway Company; and the terms and conditions of the crossing order must be based upon such seniority.

CANADA.] [BOARD OF RAILWAY COMMISSIONERS.

GRAND TRUNK PACIFIC RY. CO. v. CANADIAN PACIFIC RY. CO.

(*Nokomis Crossing Case*, No. 2108.)

Location — Priority of approval — Ownership—Construction—Crossing — Seniority—44 Vict. ch. 1, sec. 14—3 Edw. VII. ch. 7, sec. 46.

The respondent, prior to the applicant, obtained approval of the location and proceeded with the construction of a branch line under 44 Vict. ch. 1, sec. 14. The applicant pending an application to cross said line, obtained a grant from the Crown (Dominion) of the land at the crossing pursuant to 3 Edw. VII. ch. 7, sec. 46.

Held, that the respondent was senior to the applicant at the crossing.

In re Branch Lines, 36 S.C.R. 42, followed.

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THIS application was heard at Ottawa on 5th May, 1908. The facts are stated in the judgment.

D'Arcy Tate, for the applicant.
A. R. Creelman, K.C., and *E. W. Beatty,* for the respondent.

14th May, 1908. THE CHIEF COMMISSIONER:—In this application the Grand Trunk Pacific Railway Company claims it is senior to the Canadian Pacific Railway Company at the point in question. The crossing has been constructed and paid for by the Grand Trunk Pacific Railway Company, and the point in issue is as to the cost of construction and maintenance.

The Canadian Pacific Railway Company is prior to the Grand Trunk Pacific Railway Company both in sanction and location of its line of railway, as well as prior in construction work upon the ground; but since this application was launched the Grand Trunk Pacific Railway Company has obtained from the Crown a patent covering the land at the crossing, and it is now contended by counsel for the latter company that, by reason of owning this land, it is in a position to cross the line of the Canadian Pacific Railway free from burden.

I do not think this to be the fact. 44 Vict. ch. 1, contains the contract entered into between the Government and the Canadian Pacific Railway Company. Paragraph 14 of the contract gives the company authority to construct, equip, maintain, and work branch lines of railway from any point or points along their main line to any point or points within the territory of the Dominion, and before commencing any such branch, provision is made for deposit of a map or plan of such branch in the Department of Railways. The Government was bound under the contract to grant to the company the lands required for the roadbed of such branches, and for the stations, station grounds, buildings, workshops, yards, and other appurtenances requisite for the efficient construction and working of such branches, in so far as such lands were vested in the Government. Paragraph

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10 of the contract made provision that the Government should grant to the company the lands required for the roadbed of the railway and its stations; this, I presume, applying to the main line. Then, in pursuance of this contract, the branch in question was constructed; thus, in my view, entitling the railway company to obtain a grant of the lands required for the roadbed.

By 3 Edw. VII., ch. 7, being the Act respecting the construction of the National Transcontinental Railway, the agreement forming the schedule to that Act is ratified and declared binding upon His Majesty; and under section 46 of the contract the Government of Canada binds itself to procure to be granted to the Grand Trunk Pacific Railway Company, in so far as the same are vested in His Majesty in right of the Dominion of Canada, such lands as may be required for the right of way of the western division, and for all stations, station grounds, etc.

At the time this application was made, the Grand Trunk Pacific Railway Company had not acquired title to the land at the point in question; but since the application a grant has been obtained pursuant to the provisions of the contract above referred to.

It does not appear why the grant was made to the Grand Trunk Pacific Railway Company in the face of the statutory contract entered into under the provision of 44 Vict.; and I am of the opinion that the Canadian Pacific Railway Company, having constructed by virtue of the authority of that statute, became entitled to a grant covering its roadbed, and that, for the purposes of the application of the Railway Act and the disposition of the question of seniority as between these railway companies at the point in question, the production of the Crown grant by the Grand Trunk Pacific Railway Company should not be allowed to have the effect of displacing or curtailing the rights which the Canadian Pacific Railway Company obtained under prior legislation and acted upon by placing its railway upon the ground.

I am clearly of the opinion that the Canadian Pacific Railway Company is senior to the Grand Trunk Pacific Railway Com-

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pany at the point in question, and the order must contain terms based upon that company being so senior.

As to the Branch Lines Regulation, see *In re Branch Lines, C. P. Ry. Co.*, 36 S.C.R. 42.

JOINT SWITCHING RATES—JOINT TARIFFS.

CANADA.] [BOARD OF RAILWAY COMMISSIONERS.

CANADIAN MANUFACTURERS' ASSOCIATION v. CANADIAN FREIGHT ASSOCIATION.

(*Interswitching Rates Case, No.* 182.)

Competitive and non-competitive traffic—Interswitching—Contracting carrier—Tariff rates—Joint tariffs—Basis of joint rates—Refund—Railway Act, secs. 176, 329, 333, 334.

Upon complaints by shippers and consignees at various points as to the practice of adding to the tariff rates of the railway company carrying to a particular place the switching charge of another company to which the traffic is transferred for carriage and delivery at another point in or near the same place, and in cases of such transfer absorbing these extra charges where the traffic originates at competitive points (*i.e.* competitive traffic), while adding the charges when the point of origin is non-competitive (*i.e.* non-competitive traffic).

Held, (1) That a railway company's tariffs to and from particular places should, in the absence of indication to the contrary, be read as covering only traffic originating at and for delivery upon its own tracks and connecting sidings within its own terminals, and not as including traffic originating at or for delivery at or near the same places upon the lines of another carrier.

(2) That a reasonable additional rate should be payable for switching (*i.e.* the service for the short carriage on receipt or delivery).

(3) That while the company carrying such traffic for the long distance should not be obliged to absorb the whole of such switching charge, it may not necessarily be debarred from absorbing the whole of such charges, provided this does not involve unjust discrimination or preference and in case of competitive traffic it may do so.

(4) *Held*, also, that two such companies may be required to treat such traffic as joint traffic and to establish tariffs therefor under Railway Act, sec. 333, and the joint rate may be less than the sum of the two rates, and each or one of the companies required to accept less than its full rates.

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It had long been the practice of two railway companies to absorb switching charges in respect of traffic upon their respective lines to and from Toronto received or delivered on the line of the other (in respect of non-competitive freight). Without any change of tariffs this practice was recently abandoned and the switching charges added to the regular tariff rates. This practice, it was shewn, originated upon the construction of the junior company's lines into Toronto, when it had to receive or deliver its traffic wholly or mainly upon the tracks of the senior company and was practically compelled to bear the switching charges therefor. As the junior company established and enlarged its terminals, and acquired industrial sidings, the senior company followed the same practice. Upon complaint being made of this change and an application for a refund of such charges,—

Held, that although the continuance of the practice afforded some evidence of its reasonableness it was not conclusive, that an exception could not be made in the case of Toronto, that the two companies were not bound to continue the practice and all claims for refunds should be disallowed.

Laning-Harris Coal & Grain Co. v. *A. T. & S. F. R. Co.*, 12 I.C.C. Rep. 479, *Leonard* v. *C. M. & St. P. R. Co.*, 12 I.C.C. Rep. 492, *London Interswitching Case*, 6 Can. Ry. Cas. 327, followed.

Upon the report of the Chief Traffic Officer the Board fixed the basis of such joint switching rates and ordered, dividing non-competitive traffic into two classes, that (1) for switching performed upon orders of the shipper or consignee after the shipment has reached the terminal of the contracting carrier, the additional toll should not be more than 20 cents per ton for any distance not over 4 miles, with a minimum of $3 and a maximum of $8 per car, the whole of such charge being paid by the shipper or consignee; and (2) where the traffic is so consigned by the shipper as to indicate and involve switching service by another company at the time of shipment then the consignee or shipper should only be charged with 50 per cent. of such charges.

An order of the Board defining "Interswitching" and "Contracting Carrier" and embodying the above basis was issued.

THE applications which are the subject of this judgment of the Board were heard at Winnipeg on 8th August, 1904, at Toronto on 5th November, 1907.

J. E. McMullen and *E. W. Beatty*, for the Canadian Pacific Railway Co.

W. H. Biggar, K.C., and *M. K. Cowan*, K.C., for the Grand Trunk Railway Co.

J. E. Walsh, for the Canadian Manufacturers' Association.

26th December, 1907. THE CHIEF COMMISSIONER, HON. A. C. KILLAM:—The Board has had before it several applications and complaints from different places respecting what are known as switching charges. Some of these have related to the amounts

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of the charges, others to the practice of adding to the tariff rates of the company carrying to a particular place the switching charge of another company to which the traffic is transferred for carriage to and delivery at another point in or near the same place, and others to the practice of railway companies, in cases of such transfer, absorbing these extra charges where the traffic originates at a place common to the two companies, or, what are usually designated as competitive points, while adding the charge when the point of origin is non-competitive.

In some late cases before the Interstate Commerce Commission in the United States, Nos. 1073, 1074, *Laning-Harris Coal & Grain Company* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 12 I.C.C. Rep. 479, the complainants claimed that the tariff rates of the railway company, which read to Kansas City, included delivery at any point within the corporate limits of Kansas City without regard to whether this was or was not upon the lines of that company. The Commission said in its report: "This claim and argument are entirely at variance with customs of many years' standing and contemplate imposing upon the carrier a duty which it would be utterly unable to perform. The Act to regulate commerce in specific terms provides that one carrier shall not be obliged to give the use of its tracks and terminals to another carrier engaged in like business. The defendant company could not deliver cars to any industry except upon its own rails without the consent and co-operation of the carrier or carriers upon whose rails the industry sought to be reached is located or via whose rails it is reached. A carrier may not reasonably be required to accept and deliver free of charge traffic which is moved by its competitor." And again: "In the absence of tariff specifications to the contrary, the transportation shewn in carrier's tariffs to a given point are and always have been understood to include delivery to industries or unloading places located upon its own rails, and if consignee or owner of shipment orders it transported by another carrier to another place, he must expect to pay the lawful charge for that service."

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In those cases the shipments were originally billed simply to Kansas City, and, after arrival, direction was given to transfer to destinations not on the line of the originating company. But, the same principles were applied in another set of cases, No. 1078, *Leonard* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, and other cases, 12 I.C.C. Rep. 492, where it appeared that at one time the originating company absorbed the switching charge, later discontinued the practice, and subsequently resumed it; and the complainants claimed that the adoption of the practice and subsequent resumption after discontinuance shewed the unreasonableness of requiring shippers to pay the switching charge; but the Commission refused to disallow the charge. There the Commission said: "The practice at that time of absorbing switching charges without a specific tariff provision therefor was very general among the carriers. If offence against the law was involved in such practice it would rest in the absorption rather than in requiring shippers to pay, because the switching charge, being the charge of another carrier, should appear in its tariff. No switching or other terminal charges should be absorbed except under a plain and specific tariff provision therefor."

There is not in our legislation any express provision similar to that in the United States Commerce Act, that one carrier shall not be obliged to give the use of its tracks and terminals to another carrier engaged in like business. But, in the absence of any such enactment, this must necessarily be the law. Express legislative authority is necessary to enable one railway company to use the lands or premises of another company without its consent. Such authority is embodied in section 176 of the Railway Act, provided the approval of this Board is first obtained; and the Board is empowered to fix the compensation to be paid therefor. In the London case, the Board held that the transfer by one railway company to another at a junction point of traffic to be delivered on the second company's line near the junction point did not constitute a use by the first company of the second company's tracks or terminals; but that the second company was

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to be compensated by a fair rate for the receipt, carriage, and delivery of the particular traffic so transferred, including the use of its premises for the purpose. The rule was laid down that the division between railway companies of the joint rates for traffic thus interchanged should be made upon the principle of giving reasonable compensation for the service and facilities furnished by the respective companies in respect of the particular traffic thus interchanged. The order of the Board required the interchange of traffic between the lines of the Canadian Pacific Railway Company and the Grand Trunk Railway Company at the junction point near London to and from the tracks and terminals of the Grand Trunk Railway Company in and near London, and provided that the rates to be charged for such traffic should be those provided for by any joint tariffs in existence between the railway companies interested, and, in the event of there being none, the rates charged by the Grand Trunk Railway Company between the same points, and, in the absence of either, the rates charged by the Canadian Pacific Railway Company between the same points, and fixed the amounts to be charged by the Grand Trunk Railway Company. In that case the Canadian Pacific Railway Company consented and offered to absorb the Grand Trunk Railway Company's charges. The order was affirmed on appeal to the Supreme Court of Canada.

I think the principles laid down by the Interstate Commerce Commission are correct—that a railway company's tariffs to and from particular places should, in the absence of indication to the contrary, be read as covering only traffic originating at and for delivery upon its own tracks and connecting sidings within its own terminals, and not as including traffic originating or for delivery at or near the same places upon the lines of another carrier; that a reasonable additional rate should be payable for what is ordinarily designated switching, namely, the service for the short carriage and receipt or delivery, as the case may be; and that the company carrying for the long distance should not be obliged to absorb the whole of this charge. I think, however,

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that the Board may require the two companies to treat such traffic as joint traffic and to establish therefor joint tariffs under which the joint rate may be less than the sum of the two rates, and each or one of the companies required to accept less than its full rates. In such cases the principal carrier does not usually perform the full service which it performs in ordinary cases of receipt, carriage, and delivery upon and over its own lines only. There may be cases in which as much service is performed, but usually the service is less.

The Board's Chief Traffic Officer has made a report upon this subject which contains valuable suggestions and recommendations, both as to fixing the bases of switching charges and as to divisions of the joint rates between the carriers, and also as to some other matters.

In the case recently heard by the Board at Toronto it appeared that it had long been the practice of the two companies operating there (the Grand Trunk Railway Company and the Canadian Pacific Railway Company) to absorb these charges in respect of traffic upon their respective lines to and from Toronto, received or delivered on the lines of the other, and that, without any change of tariffs, they had recently abandoned this practice and adopted the principle of adding the switching charges to the regular tariff rates. The origin of the practice was explained. It appeared that, when the Canadian Pacific Railway was constructed into Toronto, it had to receive and deliver its traffic wholly or mainly upon the tracks of the Grand Trunk Railway Company and was practically compelled to bear the charges therefor, and that, as the Canadian Pacific Railway Company established and enlarged its terminals and acquired sidings to industries and places of business, the Grand Trunk Railway Company followed the same practice in reference to traffic received and delivered on the tracks of the Canadian Pacific Railway Company. It does not appear to me that the railway companies are bound to make an exception in the case of Toronto, or that, because of their having thus mutually absorbed these

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charges for a considerable length of time, they must necessarily continue to do so forever. The whole question is one of reasonableness, and while the continuance of the practice affords evidence of its reasonableness; it is not conclusive. I do not feel that we can properly require the companies to continue it. I think, too, that each company, without changing its tariffs, could add the charge of the connecting carrier. The switching tariffs should certainly be filed with the Board, but, in the absence of filing, the rates set out in the standard tariffs would prevail; and it is not claimed that charges were made at higher rates. All claims for refunds should, therefore, in my opinion, be disallowed. The exact amounts which should be paid, and the exact divisions for the aggregates of the two sets of charges which are to be allowed hereafter, were not considered and discussed at Toronto. Our attention was confined to the main questions of principle. Naturally the scales suggested by the Chief Traffic Officer cannot well be applied generally without consideration of local circumstances.

While, in my opinion, the railway companies by which the principal carriage is performed should not be obliged to bear the whole of these switching charges, it does not follow that they should be debarred from absorbing the whole of such charges, provided that this does not involve unjust discrimination or preference. The Railway Act recognizes that what might otherwise constitute unjust discrimination or preference may be justified as the effect of competition. If a railway company receiving or delivering traffic upon its own lines is obliged to charge its full tariff rates without absorbing the switching charges of the line from which it receives or through which it delivers the traffic, it will often be deprived of the opportunity to get traffic from or to places common to it and other railway companies, and such places would often lose some of the benefit of competitive conditions. While this may result in some disadvantage to non-competitive points, the existence or possibility of such disadvantage cannot, I think, be considered as constituting unjust preference

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or discrimination. I think that the Board cannot properly require the railway companies to absorb the whole of such charges in all cases, or prohibit them from absorbing them where this is induced by real competition.

I would recommend that copies of the Chief Traffic Officer's report and of this opinion be forwarded to the various complainants and applicants upon this subject, as well as to the railway companies particularly affected in those cases, and to the Canadian Freight Association, as representing the railway companies generally, that all such parties may have an opportunity of making any observations or suggestions upon the details outlined in the Chief Traffic Officer's report, and upon their application to the particular points to which these applications and complaints relate, after which the Board will be prepared to deal with these particular cases individually.

The report of the Chief Traffic Officer above referred to, is as follows:—

18th December, 1907. In the matter of interswitching charges generally, with special reference to the evidence adduced and the arguments presented at the hearings in Winnipeg, Lindsay, and Toronto Interswitching Cases, and with the object of suggesting a standardization, I beg to submit my report and recommendations as follows:—

By "interswitching" I mean the local service performed in moving loaded cars at and about common points by one company for another, with no reference to the transfer of through or interline freight.

Although switching tolls as such are not particularized in the Railway Act, it is obvious that they must fall under one or other of the classes of tariffs specified in the sections relating to freight tariffs, and of these it seems clear that the "special" or "joint" tariff must be designated, perhaps both.

Section 333 of the Railway Act provides that, "where traffic is to pass over any continuous route in Canada operated by two

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or more companies, the several companies may agree upon a joint tariff for such continuous route''; and in section 334 the Board is authorized, in the event of failure by the companies so to agree, to require the companies to agree upon and file a joint tariff satisfactory to the Board for such continuous route, which the Board may consider a reasonable and practicable route. In sub-section 3 the Board is authorized, in case of disagreement between the companies, to apportion the joint rates between the companies. Traffic lifted or delivered locally by one company for another, under tariffs agreed upon by the companies or prescribed by the Board, would seem to be covered by these sections; and that is my view, for the Act makes no restriction with respect to the length of haul, which may be only half a mile at an arbitrary switching rate—a proportional rate—or thirty miles at a percentage of the joint tariff rate.

Assuming the correctness of this view, and granting the proposition that a joint rate may reasonably and lawfully be higher than the rate for the same distance over the line of one carrier, the questions to be considered are the basis for such joint switching rates, and whether, or to what extent, the additional toll should be paid by the carrier, or by the consignee or shipper.

In the past these interswitching rates have had no fixed basis, and although the companies in their tariffs now filed with the Board have taken a decided step towards uniformity, there is still considerable variation.

The charge made by the switching company is, as a rule, less than its standard tariff for the same distance; the contracting company, although it gets the whole or the bulk of the revenue, makes no reduction whatever from its charges, except in the case of competitive traffic on which it finds it expedient to absorb the whole of the switching charge. If, however, the joint traffic is destined to more or less distant places beyond the point of interchange (three or four miles, or three or four hundred) the common practice is for each carrier to make a reduction from its local charges, the joint through rate so arrived at being sub-

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divided between them on an arbitrary rate basis, or on percentages based on the distance hauled by each company. (I do not consider a combination of local rates to be a joint rate, although it may be referred to as a through rate. A joint rate, in my opinion, implies an arrangement or agreement between the companies, and section 333 of the Act says the companies may "agree" upon a joint tariff; whereas no agreement is necessary for the charging of the local rates on through traffic—these can be added together by anyone.)

As to the question whether, or to what extent, the switching tolls should be paid by the carriers or their customers; on competitive traffic the companies have always assumed this terminal charge, and I think that without being necessarily required to extend it to non-competitive traffic they should be allowed to continue this arrangement, for it produces competition in service and facilities, if not in rates, and seems to be permitted in the Act by section 329 relating to competitive traffic.

As regards non-competitive traffic, a distinction may reasonably be made between traffic so consigned by the shipper as to indicate and involve switching service by another railway company; and traffic which is not so consigned, but which is so disposed of by the consignee as to require local delivery by another railway company. A carload consigned in the first place to a siding or firm which the trains of the contracting carrier cannot reach, except under interswitching arrangements with a connecting line, would belong to the first class.

A carload consigned to a siding or firm located on the tracks of the contracting company, or to a firm which usually accepts the contracting company's delivery, but which is ordered by the consignee for interswitching delivery would belong to the second class, for, subject to "spotting" for unloading on its own tracks, the contracting company has performed its obligations when the car has been detached from the train at its destination. On this second class I consider that the consignee may reasonably be required to pay the whole of the charge of the switching com-

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pany for the additional service. He may avoid it by having his goods consigned in the first instance to the siding or industry where actual delivery is to be made, thus placing it in the first class. There is no doubt that the congestion at terminals which has become so prevalent is partly due to the delay to cars awaiting placing orders, and if it be recognized that the owners of traffic which I have placed in the second class may properly be charged a higher interswitching toll than those in the first class, this congestion ought, to some extent, to be relieved.

With respect to the first class of non-competitive traffic referred to above, I consider that the company for which the terminal service is performed should bear a proportion of the switching charge, and should not charge the whole against the property, as, with few exceptions, is done at present. This opinion is based, not altogether on saving in terminal expenses, for in some cases it may cost more to deliver to the switching road than to team tracks, but on the principle that if the traffic were interchanged at an outside junction point, say 25 or 30 miles from the destination point, the company would, on a percentage basis of sub-division, have to accept less than its local rate, besides losing the additional revenue which it would otherwise earn by hauling through to destination. It is true the companies may not in all cases have joint tariffs through such outside junction points, but sooner or later they undoubtedly will have them under the joint tariff sections of the Act. I consider, however, that before being required to assume any portion of the switching charge the contracting company should fairly be entitled to a net minimum revenue per car.

In the apportionment of this interswitching charge on *non*-competitive traffic it is my opinion that the principle of *average* should govern; for, relatively, it is so small that a rate graduated according to the length of haul would prove only inconvenient and harassing. My suggestion is that the carrier should assume fifty per cent.; or rather that the consignee or shipper, as the case may be, should be charged only with fifty per cent.

I have stated that there is still considerable variation in the

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switching charges at different points. In order to avoid the frequent complaints to the Board of excessive switching charges, and the investigations which these call for, and for the convenience alike of the carriers and the public, I believe that a uniform scale or standardization of switching tolls ought to work out satisfactorily, subject, possibly, to modifications where exceptional circumstances and conditions may appear to make these necessary. The way for a uniform scale seems to have been cleared by the judgment of the Board in the London Interswitching Case. To quote from the judgment: "The provisions of the Railway Act which require railway companies to interchange traffic at connecting points are introduced, not for the purpose of benefiting one railway company at the expense of another, but solely in the interests of the public. The law cannot recognize anything in the nature of a good-will of the business of either railway company thus affected for which another should give compensation. In my opinion, the division between railway companies of the joint rates for traffic thus interchanged should be made upon the principle of giving reasonable compensation for the service and facilities furnished by the respective companies in respect of the particular traffic thus interchanged, and not by reference to the magnitude of the business of one company or the other at particular points, or the respective advantages which each can offer to the other there, or a comparison of the loss which one is likely to sustain with the gain likely to accrue to the other from the giving of the facilities which the law requires."

In the revised switching tariffs of the principal companies a tendency is observed towards a uniform switching toll of one cent per 100 lbs., with a variable minimum depending upon the length of the haul, which may run from a few hundred feet to four miles or over. This toll of one cent per 100 lbs. (with a minimum of $5.00 per car) was that prescribed by the Board for G.T.R. service at London, in the first interswitching case that came before it, but in that instance the applicant company (the C.P.R.) desired and agreed to assume the entire charge on non-

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competitive as well as competitive traffic. I consider that the amount of this terminal charge should be susceptible of broad treatment, and that an average rate per 100 lbs., or per ton, embracing the short and the long hauls, should prove a convenience alike to the carrier and the public.

Without expressing any opinion as to the reasonableness or unreasonableness for this or any other terminal service, but selecting as a basis what is probably the maximum published rate for ordinary interswitching services, I would take that for which the companies themselves are shewing a preference, namely, one cent per 100 lbs., which rate I would apply to the traffic comprised in the second class referred to above. The interswitching tolls recommended below should, in my estimation, prevail, as maxima, for all distances covered by a switch service up to and including four miles; but should not interfere with any lawfully published rates between stations for ordinary freight service.

My recommendations are:—

(*a*) That the contracting carrier be permitted to absorb the toll charged for the interswitching of competitive traffic;

(*b*) That on traffic consigned to sidings, industries, or parties located on, or most conveniently to, the tracks of the contracting carrier, or to industries or parties that have habitually accepted the contracting carrier's delivery, or which may be so consigned as not to indicate the delivery required, and which is subsequently ordered by the shipper or the consignee, or their agents, for interswitch delivery involving an additional service by another railway company, and which is so switched, the contracting company may collect an additional toll not exceeding 20 cents per ton for any distance not over four miles, and for such distance may make the minimum additional toll $3.00, and shall make the maximum additional toll $8.00 per carload;

(*c*) That on traffic consigned to sidings, industries, or parties located on, or most conveniently to, the tracks of other than the contracting carrier, or to industries or parties that have habit-

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ually required such other carrier's delivery, the contracting company may, for the interswitching service, collect an additional toll not exceeding 10 cents per ton for any distance not over four miles, and for such distance may make the minimum additional toll $1.50, and shall make the maximum additional toll $4.00 per carload; and shall not be obliged to pay to the company which performs the switching service a greater toll than 20 cents per ton, or a greater minimum toll than $3.00, or a higher maximum toll than $8.00, per carload; provided that the net revenue of the contracting company shall not thereby be reduced below 2 cents per 100 lbs.;

(*d*) That the distance to be charged for shall be computed to or from the nearest point of interchange;

(*e*) That these tolls shall include the switching of the empty car in the reverse direction when necessary;

(*f*) That traffic consigned to "order" shall be subject to clauses (*b*) or (*c*) according as the parties to be advised of arrival fall within those clauses respectively;

(*g*) That on traffic interswitched at the point of shipment clause (*c*) shall apply, in so far as it may be applicable;

(*h*) That the freight tariffs of all companies subject to the Railway Act shall clearly shew at what points included in such tariffs, and under what circumstances, interswitching services will be performed and at whose expense;

(*i*) That these tolls for interswitching service shall not interfere with or supersede any lawfully published freight rates from station to station for ordinary freight service;

(*j*) That all other arrangements or devices, such as free or assisted cartage, or cartage allowances, intended to equalize the facilities of competing companies at common points, except such as are published in the freight tariffs of the companies, be prohibited; and that all preference, prejudice and discrimination in such published cartage arrangements be also prohibited.

I would recommend further that any order that may be

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issued with respect to interswitching tolls be issued under section 333 of the Railway Act.

Wherever I have used the term "contracting company" it should be understood to include also the connecting company or companies, wherever the lines of two or more companies, irrespective of the switching company, are comprised in the haulage from the point of shipment to the point of destination.

11th May, 1908. The views of the Canadian Freight Association on the foregoing report of the Chief Traffic Officer are contained in the following letter from the chairman, Mr. W. R. MacInnes, addressed to the Secretary of the Board:—

Dear Sir,—The railway companies, members of the Canadian Freight Association, having received copies of the opinion of the late Chief Commissioner, and report of the Chief Traffic Officer of the Board, dated the 18th December, 1907, and having considered the recommendations of the latter, beg, through their Advisory Committee, to communicate the following suggestions and observations on the same, for the consideration of the Board.

Dealing with the recommendations of the Chief Traffic Officer *seriatim*:—

(*a*) That the contracting carrier be permitted to absorb the toll charged for the interswitching of competitive traffic.

The absorption on competitive traffic has been uniformly recognized in the decisions of the Interstate Commerce Commission and adopted in the opinion, in this case, delivered by the late Chief Commissioner. No exception is taken to the Chief Traffic Officer's recommendation in this regard.

(*b*) That on traffic consigned to sidings, industries, or parties located on, or most conveniently to, the tracks of the contracting carrier, or to industries or parties that have habitually accepted the contracting carrier's delivery, or which may be so consigned as not to indicate the delivery required, and which is subsequently ordered by the shipper or the consignee, or their agents, for interswitch delivery involving an additional service by

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another railway company, and which is so switched, the contracting company may collect an additional toll not exceeding 20 cents per ton for any distance not over four miles, and for such distance may make the minimum additional toll $3.00, and shall make the maximum additional toll $8.00 per carload.

The Chief Traffic Officer has divided interswitching on non-competitive traffic into two classes, though there does not appear to be any difference in principle between the two. His conclusion is that in respect of such switching as is performed upon orders of the shipper or consignee, after the shipment has reached the terminal of the contracting carrier, an additional toll of 20 cents per ton for any distance not over four miles, with a minimum of $3.00 and a maximum of $8.00 per car, should be charged, the whole of such additional toll to be paid by the shipper or consignee, as the case may be. To the recommendation that such switching charges as may be imposed in cases of this character, should be paid in full by the shipper or consignee, the railway companies take no exception; but objection is taken to the minimum and maximum switching tolls recommended.

In this connection, it should be pointed out that no complaint has been made to the Board that the switching charges imposed are, in themselves, excessive, or yield to the switching carrier more than a fair adequate return for the services which are rendered.

It is submitted that a minimum toll of $3.00 per car would, in many cases, not fairly compensate the switching carrier, and that no request has been made for the limiting of the maximum toll, which might be earned by the switching company at the rate which the Chief Traffic Officer considers it may fairly charge, viz.: 20 cents per ton. If 20 cents per ton is a reasonable toll when the total charge imposed amounts to $6.00 per car, it is equally reasonable if such tolls exceed $8.00 per car; in other words, the tolls should be imposed in accordance with the weight of the car switched with the minimum amount sufficient to ensure to the carrier, in each case, the lowest revenue to which it is

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reasonably entitled on a single car movement. The reasons for the imposition of a minimum charge, the principle of which is recognized by the Chief Traffic Officer in his report, are set out in detail in the reply filed by the Canadian Pacific Railway Company to the application made on behalf of the Winnipeg manufacturers respecting switching tolls in Winnipeg, under date the 28th March, 1907, and in the reply filed on behalf of the Canadian Northern Railway to the same application.

The minimum charge of $5.00 per car now generally imposed by railway companies has been sanctioned by the Board in the London interswitching case, and it is submitted is the lowest minimum toll which should be fixed, in view of the cost of service rendered in various terminals, and the lengths of the haul in the switching movement usually required.

It should also be borne in mind that it is very often necessary in the case of perishable freight, such as fruit, dairy products, live stock, etc., and in the case of other classes of freight so as to provide quicker despatch under exceptional circumstances, that one car only be moved at a time and while such movement is being performed the services of an engine and switching crew of three or four men are exclusively engaged in this operation.

Having in mind the present situation at the large terminals in Canada, *i.e.*, Toronto, Montreal, Hamilton, Winnipeg, Brandon, Vancouver, etc., where by far the greater portion of interswitching is performed, it will be apparent that, in view of the expensive and varying nature of the switching service generally rendered necessary, $5.00 per car is the lowest reasonable minimum which the switching companies should be asked to accept. The Board will appreciate that it is becoming more and more expensive for railway companies to acquire land for the purpose of extending their large terminals to meet the requirements of the increasing traffic, that these extensions are made primarily to take care of their own traffic, and that if traffic of other railway companies is to be admitted into these terminals, the charge

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should be, in some degree, commensurate with the expense to which the owning company has been put to provide them. Moreover, with the extension of such terminals, the switching movements become more complicated, burdensome, hazardous, and expensive. In some terminals the railways are obliged to perform their switching work during certain restricted hours of the day or night, as the case may be, and are not able to perform this work when most convenient, or cheaper, to themselves. This is an additional burden and expense. The expense of switching at large terminals is also aggravated by the per diem charges which railways have to pay for foreign equipment, viz.: 25 cents per day.

In support of the contention that no maximum should be fixed, it should be pointed out that the imposition of a maximum would, in many cases, result in shippers entitled to equal charges not receiving the same treatment; for example, if two carloads of coal, each weighing 50,000 lbs., were switched, the toll charged would be $10.00, whereas if one carload of coal weighing 100,000 lbs. was switched for another shipper, the charges imposed would only amount to $8.00, the first shipper being at a disadvantage of $2.00, simply because his shipment happened to be loaded in two cars instead of one. This would be unfair to the consignee and railway companies alike, in that the latter would not, in the case of a 100,000 lb. car, get the full toll for the service rendered, and the former would thereby obtain an advantage due solely to the type of car which was used for his shipment.

The railway companies object to the adoption of any system such as the recommendation of the Chief Traffic Officer contemplates, of consigning goods to specific sidings instead of as at present, to named individuals or companies at named destinations. It is not the practice of railway companies, and is, in fact, expressly prohibited by their regulations, to accept goods so consigned. The reason is obvious, the carrier cannot guarantee equally quick delivery to named sidings or specific tracks as it can when the delivery in its terminals is not restricted.

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Many circumstances may exist which make delivery to a specific siding impossible, and while railway companies endeavour to meet the wishes of consignees wherever it is possible to do so, by placing cars where they are desired, they cannot obligate themselves to do so, regardless of the conditions existing at point of delivery, for which the carrier may be in no wise responsible.

(*c*) That on traffic consigned to sidings, industries, or parties located on, or most conveniently to, the tracks of other than the contracting carrier, or to industries or parties that have habitually required such other carrier's delivery, the contracting company may, for the interswitching service, collect an additional toll not exceeding 10 cents per ton for any distance not over four miles, and for such distance may make the minimum additional toll $1.50, and shall make the maximum additional toll $4.00 per carload; and shall not be obliged to pay to the company which performs the switching service a greater toll than 20 cents per ton, or a greater minimum toll than $3.00 or a higher maximum toll than $8.00 per carload; providing that the net revenue of the contracting company shall not thereby be reduced below two cents per 100 lbs.

The basis of the Chief Traffic Officer's recommendation, as outlined in paragraph "C" quoted above, is the opinion expressed by him on pages 4 and 5 of his report, to the effect that the company for which the terminal service is performed should bear a proportion of the switching charge, and should not charge the whole against the property.

The Chief Traffic Officer admits that, in some cases, it may cost more to deliver to the switching road than to the team tracks of the contracting carrier, which cannot be disputed, and was clearly demonstrated in the reply filed by the Canadian Pacific Railway Company to the application of the Winnipeg manufacturers referred to above.

He contends, however, that the whole charge should not be imposed upon the goods "on the principle that if the traffic were interchanged at an outside junction point, say 25 or 30 miles

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from the destination point, the contracting company would, on a percentage basis of subdivision, have to accept less than its local rate, besides losing the tonnage revenue which it would otherwise earn by hauling through to destination."

The existence of any such principle as the Chief Traffic Officer enunciates is disputed. It must always be borne in mind that only non-competitive business is here under consideration, and that it is not the practice of the railway companies to interchange non-competitive business at junction points outside of a terminal reached by both. While it is quite true that, in order to secure traffic which they otherwise would not secure, and in a common interest, carriers frequently establish joint rates through junction points, and in doing so, may perhaps accept less than their local rates to and from such junction points, this practice is not followed in those cases in which the contracting carrier is capable of delivering goods to the terminal to which they are consigned over its own rails, there being in such cases a total absence of the considerations which are the basis for the practice, where it exists, namely, the mutual benefit of the carrier concerned and the securing of traffic not otherwise capable of being secured. It should also be pointed out that where such through routes are established, it is done to effect a continuous route at a through rate from and to a territory not reached by the railways of either of the joining carriers alone.

The principle enunciated by the Chief Traffic Officer referred to above, has thus no application to the question under consideration. A prorating arrangement implies joint tariffs, and joint tariffs imply the existence of a joint route. Joint routes are not established to permit one railway to have access to the facilities of another railway at the same terminal point which is reached by its own line, nor even in a contiguous territory. Joint routes are only established to connect one or more railways together, forming for their mutual advantage and the benefit of the public, a through line in the same general direction, and thus connecting places not otherwise connected. For example, Windsor, Ont.,

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is connected with Halifax, N.S., by a joint route mutually established between the Grand Trunk and Intercolonial Railways. Chicago and New York are connected by a joint route mutually established between the Grand Trunk and the New York Central. St. Louis, Mo., is connected with St. John, N.B., by a joint route mutually established between the Wabash and Canadian Pacific Railways, but it is not the practice of the railroads to adopt this principle in what is known as its local or non-competitive territory.

This leads up to the broader principle referred to by the Chief Traffic Officer, viz.:—

> "It is true the companies may not in all cases have joint tariffs through such outside junction point, but sooner or later they undoubtedly will have them under the joint tariff sections of the Act."

In practice, the adoption of this principle would mean that a shipper at a local station on the Grand Trunk Railway could reach a local destination on the Canadian Pacific Railway under a joint tariff, involving, for example, a haul of 50 miles over each line, but it would not mean that the through rate covering the haul of 50 miles by each company should be the same as for a haul of 100 miles over one system. The railways agree with the statement of the Chief Traffic Officer on page 2 of his report, reading:—

> "Granting the proposition that a joint rate may reasonably and lawfully be higher than the rate for the same distance over the line of one carrier."

Again, the Chief Traffic Officer, in the last paragraph of his report, states:—

> "Wherever I have used the term 'contracting company' it should be understood to include also the connecting company or companies, wherever the lines of two or more companies, irrespective of the switching company, are comprised in the haulage from the point of shipment to the point of destination."

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There might conceivably be a joint route comprising three companies, each company having a haul of 25 miles. The railways contend it would be absurd to expect that the through rate for such a service of 75 miles should be as low as for a direct haul of 75 miles over one line. The same absurdity would exist if a railway originating non-competitive traffic were compelled to give such traffic to a connecting carrier at a junction point, say 25 or 30 miles short of the destination, and the through rate via the two lines was made equal to or the same as for a continuous haul for the same distance by one railway.

For example, let us assume a shipment originating at "A," a local station on the Grand Trunk, eighty miles from destination "B," which the Grand Trunk can reach over its own rails. In the order of the Board, No. 3258, in the complaint of the Board of Trade of the City of Toronto, Schedule "A" provided for that distance a rate of 26 cents per 100 lbs., first class, and 13 cents per 100 lbs., fifth class. If the Grand Trunk Railway were compelled to give up this shipment to the Canadian Pacific at a junction point ten miles short of destination, it would be entitled, under Schedule "A," for its haul of seventy miles to such junction point, to 24 cents per 100 lbs., first class, and 12 cents per 100 lbs., fifth class. The Canadian Pacific Railway Company, for its haul of ten miles from the junction point to destination, would, under Schedule "A," be entitled to 10 cents per 100 lbs., first class, and 5 cents per 100 lbs., fifth class. The sum of these two rates would be 34 cents per 100 lbs., first class, and 17 cents per 100 lbs., fifth class, whereas the rate via one line for that distance, under Schedule "A," would be, as above stated, 26 cents per 100 lbs., first class, and 13 cents per 100 lbs., fifth class, or a difference of 8 cents per 100 lbs., first class, and 4 cents per 100 lbs., fifth class.

The railways submit that in those cases in which through rates are established for joint routes the rates ordered by the Board, as mentioned above, should be the minimum provided for each company in the division of the through rate. In any event,

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it could not be reasonably ordered that the through rate via two connecting railways should be as low as by the single line, and any reasonable difference would make the rate sufficiently high to overcome any benefit to a consignee in ordering the diversion of the traffic from the natural route, *i.e.*, the line originating the traffic at a non-competitive point on its own system and serving the same destination, to an artificial route. The railways submit that it is a fallacy, under such conditions, to expect that the through rate should be the same, and, as before stated, agree with the Chief Traffic Officer that such "a joint rate may reasonably and lawfully be higher than the rate for the same distance over the line of one carrier."

It must also be borne in mind that the rates provided for by the order of the Board, No. 3258, never contemplated, and do not include, the terminal or switching charges of connecting lines, but cover only the transportation service between stations on one railway. This is further confirmed in the opinion of the late Chief Commissioner in this case, viz.:—

> "I think the principles laid down by the Interstate Commerce Commission are correct that a railway company's tariffs to and from particular places should, in the absence of indication to the contrary, be read as covering only traffic originating at and for delivery upon its own tracks and connecting sidings within its own terminals, etc., and not as including traffic originating or for delivery at or near the same places upon the lines of another carrier."

The Chief Traffic Officer has fallen into the error of considering the divisions between railway companies on through or joint rates as determining what switching charge should be imposed and how it should be borne. It is obvious that the divisions between the carriers can have no bearing upon the question except in so far as they form a joint charge which may be attacked. If the rates established by the Board under order No. 3258 are reasonable, and do not include terminal charges of another road, and they do not, and if the switching charge subsequently fixed

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by the Board is found to be reasonable, there cannot, it is submitted, be any question as to the division of those charges between the carriers; in other words, that the sum of two rates each in itself reasonable, cannot be unreasonable, and if the total amount sought to be imposed is reasonable, there can be no reason for any portion of it being reduced, or, what has the same effect, saddled upon the carrier.

The railway companies would point out that the effect of the Chief Traffic Officer's recommendation "C" would inevitably be to induce shippers to consign their goods so as to avoid the payment of the full switching charge; in other words, the practical result would be that all switching charges would be divided between the carrier and the consignee, the latter paying only 50 per cent. of the charge formerly imposed for the services rendered by the switching company. There has been no complaint made, as previously pointed out, that the switching charges, in themselves, are unreasonable, and the Chief Traffic Officer's suggestion that they should be arbitrarily reduced by 50 per cent., which would be the result of dividing them between the contracting carrier and the shipper, is an entirely novel one, unsupported by any authority in England, the United States, or Canada, and contrary to the practice of railway companies both in England and on this continent.

If one cent per 100 lbs., with a minimum of $5.00, fixed by the Board as a fair charge to be paid the Grand Trunk for switching at London, is a reasonable toll, then no circumstances have been shewn in any of the applications now before the Board for consideration, which would justify the Board in arbitrarily reducing that rate and reducing the minimum amount to be charged, as is sought to be done by the Chief Traffic Officer.

The railway companies would further point out that one of the inevitable results of switching cars to the tracks of other railway companies in large terminals is to deprive the contracting carrier of the use of its own rolling stock for a much longer period, in the majority of cases, than would be the case were

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the cars held on its own tracks or delivered to sidings under its own control. This is a circumstance which it is submitted the Board should take into consideration, not only in determining the principle upon which the charges are to be imposed, but the amount of the charges themselves.

The remarks made by the railways regarding minimum and maximum toll, in connection with clause "B," apply equally in the case of clause "C." As regards the suggestion of the Chief Traffic Officer, viz.:—

> "That the net revenue of the contracting company shall not thereby be reduced below 2 cents per 100 lbs."

the railways do not consider this would give them fair protection, because on articles taking a low minimum the net revenue might frequently not be in excess of $4.00 or $5.00 per car, and many instances would no doubt occur where connecting lines' switching would be in excess of the transportation companies' revenue.

The railway companies would also point out that the use of the words "or most conveniently to," in line two of clause "C" of the Chief Traffic Officer's recommendations, is inapt, in that switching arrangements are not ordinarily entered into for the purpose of assisting cartage or reducing the cartage charges to consignee, but to give the advantage of delivery on its own tracks to consignees having warehouses situated on or adjacent to the sidings and team tracks of the switching company. The railway companies, therefore, submit the words "or most conveniently to" should, in any event, be omitted from the clause, and the words "when immediately adjacent to" inserted in lieu thereof.

(*d*) That the distance to be charged for shall be computed to or from the nearest point of interchange.

The railway companies suggest that the wording of this recommendation be amended so as to read as follows:—

That the distance to be charged for shall be computed to or from the point of interchange established by the carriers.

(*e*) That these tolls shall include the switching of the empty car in the reverse direction when necessary.

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The railway companies see no objection to the recommendation contained in this clause.

(*f*) That traffic consigned to "order" shall be subject to clauses (*b*) or (*c*) according as the parties to be advised of arrival fall within those clauses respectively.

The railway companies object to the recommendation contained in clause "F" for the reason that it is an extension of the principles laid down in the earlier part of the Chief Traffic Officer's report. The fact that the person or company to be advised of the arrival of an "order" shipment has a place of business on the tracks of either the contracting or the switching company can have nothing whatever to do with the nature of the service or delivery which the switching company is obliged to perform; in fact, in practice, the additional directions as to delivery would require to be given in almost every case where goods are consigned to "order," unless delivery is taken on the tracks of the contracting company. Any subsequent directions as to delivery which may be given by the party to be advised would involve an additional switching service which could not have been contemplated at the time the original shipping instructions were given. An "order" bill of lading would have to be surrendered to the contracting carrier before instructions as to delivery could be accepted, and immediately such instructions were given, the shipment would fall within the provisions covered by clause "B" of the Chief Traffic Officer's report, and could not in any case come within the provisions of clause "C." In view of the observations previously made herein, and the objections which the carriers have urged to the principle laid down by the Chief Traffic Officer of requiring the contracting carrier to absorb in the cases mentioned a portion of the switching charge of the delivering carrier, the railway companies submit that this recommendation should be omitted. It is obvious that "order" shipments should not be in any different position than those consigned direct, and that if the principle for which the railway companies are contending—viz., that they should not be required

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to absorb any portion of the toll on non-competitive traffic—is well founded, there is no necessity for distinguishing traffic so consigned from other non-competitive traffic.

(*g*) That on traffic interswitched at the point of shipment clause (*c*) shall apply, in so far as it may be applicable.

The railway companies contend that the same principles that should apply in the cases of traffic being delivered at a terminal naturally apply in those cases where traffic is moved by a switching carrier and delivered to a connecting carrier for furtherance to destination. In other words, that the charges from the point of origin to the line of the connecting carrier should be the same as in the reverse direction, and that the principle of non-absorption on non-competitive traffic should be equally applicable. The railway companies therefore object to this recommendation.

(*h*) That the freight tariffs of all companies subject to the Railway Act shall clearly shew at what points included in such tariffs, and under what circumstances, interswitching services will be performed, and at whose expense.

If the recommendation that the tariffs of the railway companies should shew at what point and under what circumstances interswitching service will be performed means the special interswitching or terminal tariffs, the railway companies see no objection to the recommendation. This is in accordance with their present practice and that of the United States Lines under the requirements of the Interstate Commerce Commission. It would not be practicable to shew this information in every class or commodity tariff.

(*i*) That these tolls for interswitching service shall not interfere with or supersede any lawfully published freight rates from station to station for ordinary freight service.

The railway companies see no objection to the recommendation contained in this clause.

(*j*) That all other arrangements or devices, such as free or assisted cartage, or cartage allowances, intended to equalize the facilities of competing companies at common points, except

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such as are published in the freight tariffs of the companies, be prohibited; and that all preference, prejudice, and discrimination in such published cartage arrangements be also prohibited.

The railway companies understand this means that any equalizing arrangements made must be published in the companies' freight tariffs, which the railways understand to mean switching or terminal tariffs, to which they see no objection.

The Chief Traffic Officer asks that any order of the Board made respecting interswitching should be made under section 333 of the Act. Why? Because he apparently recognizes that even on the theory enunciated by him the Board would not be warranted in making an order reducing the tolls of the contracting carrier unless it could do so by virtue of the provisions of this section and the following section alone.

Sections 333-334, so far as material to this enquiry, read as follows:—

Section 333.—"Where traffic is to pass over any continuous route in Canada operated by two or more companies, the several companies may agree upon a joint tariff for such continuous route, and the initial company shall file such joint tariff with the Board, and the other company or companies, shall promptly notify the Board of its or their assent to and concurrence in such joint tariff."

Seetion 334.—"In the event of failure by such companies to agree upon any such joint tariff as provided in the last preceding section, the Board on the application of any company or person desiring to forward traffic over any such continuous route, which the Board considers a reasonable and practical route, or any portion thereof, may require such companies, within a prescribed time, to agree upon and file in like manner a joint tariff for such continuous route, satisfactory to the Board, or may, by order, determine the route, fix the toll or tolls and apportion the same among the companies interested, and may determine the date when the toll or tolls so fixed shall come into effect."

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2. "Upon any such order being made the companies shall as soon as possible, or within such time as the Board may require, file and publish a joint tariff in accordance with this Act, and in accordance with such order."

3. "In any case where there is a dispute between companies interested as to the apportionment of a through rate in any joint tariff, the Board may apportion such rate between such companies."

4. "The Board may decide that any proposed through rate is just and reasonable, notwithstanding that a less amount may be allotted to any company out of such through rate than the toll such company would otherwise be entitled to charge."

Section 333, and consequently section 334, are only applicable in respect of traffic "passing over any continuous route in Canada operated by two or more companies."

Is traffic originating at local Grand Trunk points destined to Toronto, also on the Grand Trunk, and then switched to the C.P.R. for delivery, traffic passing over a continuous route operated by two or more companies?

The railway companies submit with confidence that it is not. What element of continuousness exists by reason of the fact that switching may be done between the tracks of the two companies in the same terminal, both of them perhaps reaching the terminal from different directions?

It must always be borne in mind that traffic is consigned from one named place to another, and if after arrival at the point of destination a short interswitching movement may be necessary to effect delivery at a specified siding of another carrier the shipment is not thereby changed from a purely local to a through shipment. For example, a shipment from "A." a point on the Grand Trunk, to Toronto, also a point on the Grand Trunk, is a local shipment. Is it made a shipment over a continuous route if after reaching the Grand Trunk terminals at Toronto it is switched a few hundred yards to a C.P.R.

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track? It is submitted with deference that sections 333 and 334 of the Act do not extend to, and were never contemplated to extend to, a switching movement performed after the initial transportation is concluded.

It should further be pointed out that according to the ruling of the late Chief Commissioner, unless shewn to the contrary, the rate mentioned on the bill of lading only includes the carriage from one point to another, both on the originating carrier's railway. Unless the bill of lading shews a through rating and through routing, the switching charge is something entirely outside the scope of sections 333 and 334 and the rate shewn would not include a switching charge. If the traffic has reached the place to which it is consigned it has reached its destination, *i.e.*, it has reached the point to which the rate charged entitles the shipper to have it carried.

In conclusion the railways beg to refer the Board to the arguments already filed, which deal fully with the principles upon which these switching charges should, in the estimation of the railway companies, be based, with particular reference to the conditions existing at the terminals, the switching charges at which, were the subject of the enquiries. In particular, the railway companies would reiterate the advisibility of the Board accepting and applying the principle laid down by the Interstate Commerce Commission in the cases referred to in the judgment of the late Chief Commissioner, and approved by him, to the effect that the carrier may not reasonably be required to deliver free of charge, traffic which has moved by its competitor. If the carrier may not be required to deliver such traffic free, there is not, it is submitted, any reason why it should be required to accept half the tolls which might be fixed by the Board as a reasonable charge for the services rendered.

The railway companies desire to express their appreciation of the able and carefully prepared reports of the Chief Traffic Officer as setting out clearly the conditions as he sees them and the reasons which led to his conclusions; but for the reasons

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which are herein expressed in detail, they cannot feel that the Chief Traffic Officer's conclusions, particularly as outlined in clause "C." of his recommendations, are based upon the proper conception of the principles which should be applied in determining the propriety of the absorption of switching charges. As has been herein pointed out, the recommendations of the Chief Traffic Officer in this regard are not based on any precedent in Great Britain, Canada or the United States; and while having the merit of novelty and ingenuity, are not, it is submitted, based upon any legal or practical principle which the railways can accept as sound or should be accepted as sound by the Board.

For these reasons the railway companies respectfully submit that the recommendations to which exception is taken should not be adopted.

July 8th, 1908:—The following order was made by the Board.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA, ORDER NO. 4988.

IN THE MATTER OF

The following complaints made to the Board:—the Canadian Manufacturers' Association, the Huntsville Lumber Company *et al.*, against the Grand Trunk Railway Company of Canada; the W. Booth Lumber Company against the Grand Trunk Railway Company of Canada; the Winnipeg Manufacturers' Association against the Canadian Pacific Railway Company and the Canadian Northern Railway Company; W. J. Lovering against the Grand Trunk Railway Company of Canada; Messrs. Leak & Company against the Grand Trunk Railway Company of Canada; Messrs. T. Dexter & Son against the Grand Trunk Railway Company of Canada; the Boake Manufacturing Company against the Grand Trunk Railway Company of

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Canada; the Peterborough Sandstone & Brick Company against the Canadian Pacific Railway Company and the Grand Trunk Railway Company of Canada; the Town of Lindsay, Ontario, against the Grand Trunk Railway Company of Canada, the Lindsay, Bobcaygeon & Pontypool Railway Company, and the Canadian Pacific Railway Company; the Windsor, Essex & Lake Shore Rapid Railway Company against the Père Marquette Railway Company; Messrs. Melady & Company against the Canadian Northern Railway Company; the Board of Trade of Niagara Falls re interswitching at Niagara Falls, Ontario; and J. Davy against the Niagara, St. Catharines & Toronto Railway Company.

WHEREAS

The foregoing and many other complaints have been made to the Board against various railway companies regarding the charges made for interswitching.

THEREFORE THE BOARD,

Having heard the evidence adduced in support of some of the said charges—certain of the same having been allowed to stand over until the matter could be dealt with in a general manner as far as possible with the view of establishing some fixed basis for payment for interswitching services—and having fully considered the views and submissions of the various interests, and the report and recommendations of its Chief Traffic Officer, under the authority conferred upon it by the Railway Act,

DOTH ORDER, DIRECT, AND DECLARE

As follows:—For the interpretation, application, and operation of this Order.

1. (*a*) "Interswitching" shall not include the service incidental to the transfer and continuous carriage of through or interline traffic between points outside of and beyond the terminal limits hereinafter prescribed.

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(*b*) "Contracting Carrier" shall, where it is necessary, between the points of shipment and delivery, to use the line or lines of another carrier or other carriers than the carrier performing the interswitching service, include such other carrier or carriers.

2. It shall be lawful for the contracting carrier to absorb the toll charged for the interswitching of competitive traffic.

3. Upon traffic destined to consignees located upon, or reasonably convenient to, the tracks of the contracting carrier, or to consignees who have customarily accepted the contracting carrier's delivery, or which may be so consigned as not to indicate clearly the delivery required, and which subsequent to shipment is ordered by the shipper, the consignee, or the agent of either, for interswitch delivery involving an additional service by another carrier, and which is so interswitched, the contracting carrier may charge and collect, in addition to its freight charges (including back charges if any), the interswitching toll of the carrier which performs such service, which toll shall not be more than twenty (20) cents per ton for any distance not exceeding four (4) miles, nor more than three dollars ($3) as the minimum and eight dollars ($8) as the maximum per carload.

4. Upon traffic destined to consignees located upon or reasonably convenient to tracks other than those of the contracting carrier, or to consignees who have customarily required such other carrier's delivery, the contracting carrier may for the interswitching service rendered necessary for such delivery charge and collect an additional toll of not more than ten (10) cents per ton for any distance not exceeding four (4) miles, nor more than one dollar and a half ($1.50) as the minimum, and three dollars ($3) as the maximum, per carload, and the interswitching toll of the carrier which performs such service shall not be more than twenty (20) cents per ton, nor more than three dollars ($3) as the minimum, and eight dollars ($8) as the maximum, per carload, provided that the contracting car-

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rier shall not thereby be required to reduce its revenue below eight dollars ($8) per carload.

5. Distance shall be computed to or from the nearest point of interchange.

6. The foregoing tolls shall include the empty movement of the car to or from the point at which it was received by the interswitching carrier.

7. Traffic consigned "to order" shall be subject to the provisions of paragraphs three (3) and four (4) of this order as the same may apply.

8. Traffic interswitched at the point of shipment shall be subject to clause four (4) of this order, in so far as the same may be applicable.

9. The class and commodity tariffs of all railway companies subject to the provisions of the Railway Act shall shew clearly and explicitly at what points and under what circumstances interswitching services will be performed, and at whose expense.

10. The tolls herein provided for interswitching service shall not interfere with or supersede any lawfully published freight rates for ordinary freight service from station to station.

11. All and every arrangement or device, such as free or assisted cartage, cartage allowances, or the like, intended to equalize the facilities of competing companies at common points except such as are lawfully published in the freight tariffs of the companies, are hereby prohibited.

J. P. MABEE,

Chief Commissioner,

Board of Railway Commissioners for Canada.

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ARBITRATION—SETTING ASIDE AWARD.

QUEBEC IMPROVEMENT CO. v. QUEBEC BRIDGE AND R.W. CO.

[(1908) *A.C.* 217.]

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

Consolidated Appeals.

Law of arbitration—Arbitrators as to value of land expropriated also appointed mediators—Award set aside—Terms of submission exceeded—Railway Act, 1903, *sec.* 161.

Where arbitrators were appointed under deeds of submission to value three expropriated lots of ground and the indemnity for damages, it being declared that they should act as mediators (amiables compositeurs) but should be bound to conform to the provisions of sec. 161 of the Railway Act, 1903, and the award in lieu of valuing the third lot in money ordered that the expropriators should return it in part and construct a road on their own adjoining land, to be maintained by them in perpetuity for the benefit of the parties expropriated:—

Held, that arbitrators who are also appointed mediators cannot disregard their instructions, and that the error vitiated the whole award.

CONSOLIDATED appeals from two decrees of the above Court (Oct. 5, 1906) from two decrees of the Superior Court for Lower Canada sitting at Quebec (February 27, 1906).

These were two actions, one to recover from the respondents $28,245, the amount awarded to them for the value of lands taken from the appellants for the purposes of their railway, the other by the respondents to set aside the award. The Superior Court decreed that the appellants should recover; the Court of King's Bench set aside the award, which was to the effect stated in their Lordships' judgment.

The Superior Court held that the arbitrators, being mediators (*amiables compositeurs*), had power to condemn the respondents to surrender to the appellants the land used for the

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temporary road to Burrow Pit, and also to open the road called Concession Road for the benefit of the appellants.

The Court of King's Bench declared the award to be absolutely void, because it ordered, in lieu of a sum of money as compensation for the value of the land therein thirdly described its return by the respondents to the appellants, after the construction of the railway, and, further, because it established, in favour of the appellants, upon the property of the respondents, a perpetual servitude.

The judgment of Cimon, J., referred to the three lots of land expropriated, and says: "It is a complete expropriation in order that it (the bridge company) may become the absolute proprietor, to which the improvement company consents, and it is for this reason, that by the compromise it is stipulated that the arbitrators should value the three lots of land and fix the indemnity for the damages. The arbitrators could not do anything else. They had no authority to decide that the third lot should not be expropriated but should be given back in good order to the improvement company after the construction of the road; it had no authority to establish on the bridge and railway company's land the servitude in perpetuity, which it establishes. The award, therefore, goes in a sense, beyond the powers given to the arbitrators, and this in an essential part which might affect, in the judgment of the arbitrators, to the detriment of the bridge and railway company, the amount which they would grant for the two first lots of land, and in another sense the award does not adjudge on all that was submitted to it, in this, that it does not value the third lot of land."

Section 161 of the Railway Act, 1903 (Canada, 3 Edw. VII. ch. 58, is as follows: "The arbitrator or arbitrators, in deciding on such value or compensation, shall take into consideration the increased value, beyond the increased value common to all lands in the locality, that will be given to any lands through, or over which the railway will pass, by reason of the passage of the railway through or over the same, or by reason of the con-

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struction of the railway, and shall set off such increased value that will attach to the said lands or grounds, against the inconvenience, loss or damage that might be suffered or sustained by reason of the company taking possession of or using the said lands as aforesaid. 51 Vict. ch. 29, sec. 153.

Pelletier, K.C., and *McMaster*, K.C., for the appellants, contended that the award was not beyond the scope of the functions of mediators. Even if those functions were limited to the determination of a sum of money to be paid to the appellants in compensation and damages for the expropriation of the three lots of land, there is nothing inconsistent with the discharge of those functions in the course actually adopted by them. They relied on the declaration of the expropriating parties that they did not require one of the pieces of land, and that they would give it back, and that they would construct a short road on their own land. They took those matters into consideration, the advantages conferred on the appellants, the consequent reduction of the damages to which they were entitled, and allowed them their due weight in estimating the total damages awarded for the two lots of land which were completely expropriated. The directions given in the award were, it was contended, matters constructively submitted to the arbitrators, who, as mediators, were not subject to the strict rules of arbitration (see C.C.P. art. 1436), but were entitled to adjudge between the parties upon lines of natural justice and to give effect to concessions which, it was contended the evidence shewed, had been made before them by the expropriating parties. Reference was made to C.C.P. 404, 405, 411-413, 1431-1444. *Great Western Railway Co.* v. *Baby* (1854), 12 U.C.R. 106, at pp. 114, 115; *Bourgoin* v. *La Compagnie du Chemin de Fer de Montreal* (1891), 19 S.C.R. 180; *Rolland* v. *Cassidy* (1880), 5 App. Cas. 381; *McGreevy* v. *Queen* (1888), 13 App. Cas. 770; *Montreal Light and Power Co.* v. *Roberts* (1906), A.C. 196, at pp. 201, 203.

G. G. Stuart, K.C., and *Taschereau*, K.C., for the respondents contended that the arbitrators exceeded their powers,

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and that the award went beyond the terms of the submission. They failed to value all the lands which the respondents required, and they sought to impose on the respondents obligations which they were under no obligation to assume, and which the arbitrators had no power to impose. It is said that they had power as mediators. But mediators cannot go beyond the terms of submission, although art. 1436 says they are not required to decide according to rules of law. That article did not empower them to neglect to value part of the land, and to order that it should be in part returned to the appellants, and that the respondents' land should be subjected to a perpetual servitude; or to order the doing of certain works in lieu of paying the money to be assessed. The neglect was in violation of the submission; the order overrode the appellants' exercise of statutory authority in taking the land in full proprietary right. The duty of the arbitrators was to value the three lots and award as compensation a fixed sum of money. As mediators, their duty was not completely altered in the way suggested, and it was denied that any concessions were proved to have been made by them before the arbitrators which justified their award. Reference was made, besides the articles of the Code and the cases referred to by the appellants, to *Breakey* v. *Carter* (1878), 4 Q.L.R. 332; *Richelieu & Ontario Navigation Co.* v. *Commercial Union Assurance Co.* (1894), Q.R. 3 Q.B. 410. They also referred to section 161 of the Railway Act.

Pelletier, K.C., replied.

The judgment of their Lordships* was delivered by

LORD MACNAGHTEN:—These are appeals from the Court of King's Bench, Lower Canada.

The appellants, the Quebec Improvement Company, were the owners of three lots or pieces of land, in the immediate

*Lord Macnaghten, Lord Robertson, Lord Atkinson, Lord Collins and Sir Arthur Wilson.

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neighbourhood of Quebec, which the Quebec Bridge and Railway company required for the purposes of their undertaking. The parties were unable to agree as to the price, and the matter was referred to arbitration. The result was an award which the Railway Company impeached by an action at law and the Improvement Company in a separate action sought to enforce. The Superior Court decided both actions in favour of the appellants. The Court of King's Bench reversed both judgments, and dismissed the appellants' action with costs. The Improvement Company appealed in both cases to his Majesty-in-Council. The appeals were consolidated and now come before this Board for final decision.

The only question at issue is the validity of the award. For the determination of that question it will be sufficient to state the effect of the award and the purport of the submission to arbitration or deed of compromise as varied slightly by a subsequent deed.

The submission is dated March 24, 1905. It begins with a recital to the effect that the Railway Company, for the purposes of the construction of its railway, was obliged to expropriate the three lots of ground described in the deed and delineated on the plan annexed. It proceeds to state that the Improvement Company wishing to avoid the delay of judicial proceedings had proposed to refer the valuation of the said lots of ground and the indemnity for the damages to the decision of arbitrators, and that the friendly arbitration, so proposed had been accepted by the railway company. Then each party names an arbitrator with power for the two arbitrators to choose a third. The submission ends by declaring that the three arbitrators should be bound and obliged strictly to conform themselves to the provisions of the Railway Act of Canada relating to the expropriation of lots of ground in similar cases, and that their decision should be final and without appeal and binding for all parties.

A third arbitrator was appointed by the two arbitrators named in the submission, and on June 29th, 1905, the deed of

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March 24, 1905, was modified by a deed of that date, which declared that the arbitrators should act as mediators (*amiables compositeurs*), but that they should be bound to conform to the provisions of sec. 161 of the Railway Act, 1903. It was also declared that the parties renounced the ordinary procedure of a judicial arbitration, such as the production of witnesses, the employment of advocates and other judicial formalities, reserving the right to produce documents before the arbitrators.

On July 12, 1905, two of the arbitrators made the award which is now impeached. The arbitrator named by the railway company did not concur.

So far as regards two of the three lots of ground, the award does not appear to be open to objection. As regards the third lot, the award is to the following effect:—

Messrs. Tanguay and Sirois, forming the majority of the arbitrators (Mr. MacCarthy not concurring), declare that the railway company should (as its arbitrator and its representatives declared that it ought to do):—

1. Restore to the Improvement Company, after the construction of the railway and the bridge, in good order that part of the land containing an acre and eighty-four hundredths of an acre marked on the plan as "Temporary line to Burrow Pit."

2. Establish on their land to the East side to the place marked on the plan for the benefit and advantage of the Improvement Company the road marked as "Concession Road," and containing forty-four hundredths (0.44) of an acre, to the end that the Improvement Company may have access by the road on foot and by carriage for all time and in perpetuity from that part of their property lying to the East of the railway to the public road.

On October 5, 1906, the Court of King's Bench delivered judgment in favour of the railway company on the ground that the award went beyond the powers conferred on the arbitrators in that:—

1. It awarded (in lieu of valuing in money the third lot of

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land) that the railway company should, after the construction of the line of railway and the bridge, be bound to restore it in good order to the improvement company.

2. That it imposed a servitude of way in perpetuity over the land of the railway company, and that the award was therefore void in toto and illegal.

Their Lordships see no reason to differ from the judgment of the Court of King's Bench. As regards the third lot of ground it is obvious that the arbitrators have not followed or attempted to follow the directions contained in the submission or deed of compromise. Arbitrators who are also appointed mediators are not obliged to adhere to legal formalities—mere irregularities are excusable—but they cannot disregard the instructions given them in the deed under which they purport to act.

The suggestion which appears on the face of the award that the order of the arbitrator does no more than carry out the intentions of the railway company, as expressed by their own arbitrator and their duly authorized representatives, is not supported by the evidence to which their Lordship's attention was called. Nor is there, in their Lordship's opinion any substance in the argument founded on certain words appearing on the plan annexed to the submission. These words are merely words of description, and it is quite clear that they were not placed on the plan for any purpose connected with the arbitration.

Their Lordships agree with the Court of King's Bench in thinking that the error which the arbitrators have committed vitiates the whole award.

Their Lordships will, therefore, humbly advise His Majesty that these appeals should be dismissed.

The appellants will pay the cost of the appeals.

Solicitor for the appellants: *Fred F. Macnaghten.*
Solicitors for the respondents: *C. Russell & Co.*

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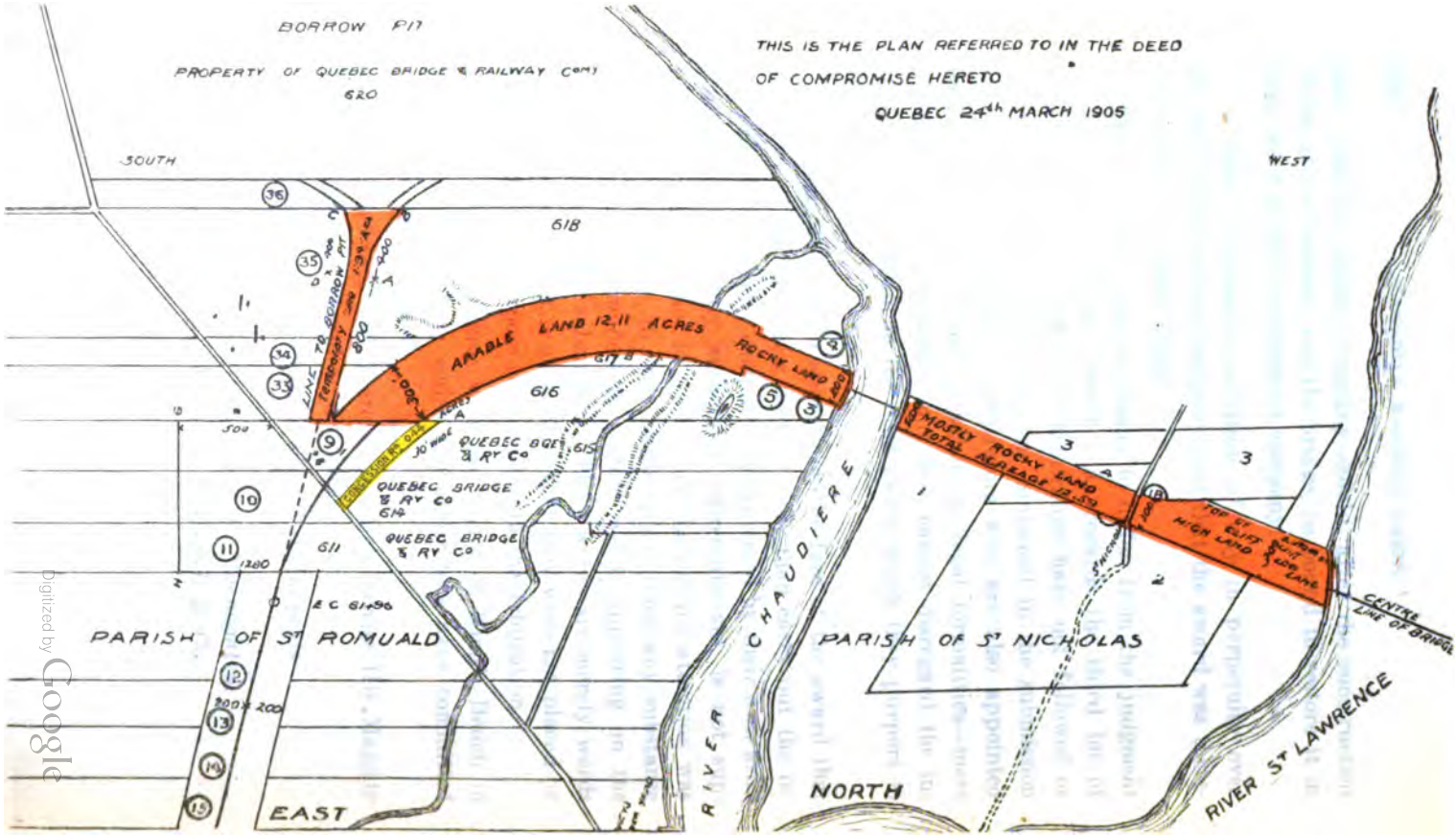

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NOTES.

A copy of the plan attached to the deed of submission is here reproduced from the Record of Proceedings. On this plan appears the words "Concession Road" "Temporary Line" and "Line to Burrow Pit" sought to be relied upon by the appellants.

The judgment appealed from is reported in (1906) Q.R. 16 K.B. 107.

The following is a further extract from the judgment of the Court of King's Bench, *per* Cimon, J.:—

"It is true that the third lot is marked on the plan 'temporary line to Burrow Pit,' but the submission or deed of compromise, although referring to the plan, only refers to it for the situation and extent of land, but it clearly stipulates that the land is expropriated absolutely and should be valued like the first two lots."

"The Quebec Improvement Company have not shewn that the Quebec Bridge and Railway Company have acquiesced in the award or that it consented to its being so rendered. What the two arbitrators constituting the majority say to this effect in their award does not bind the appellants" (now respondents). *"There is no writing shewing that the appellants"* (now respondents) *"consented to what the arbitrators pronounced as their award." Mr. Hoare (Chief Engineer of the Bridge Company)* (now respondents) *does not appear to have had any authority from the appellants to permit the arbitrators to adjudge what they have put in their award on the subject of the third lot. There is no proof that the Bridge Company authorized its arbitrator or any other to declare what the two arbitrators in the majority mention in their award."*

The record shews that Mr. Hoare in his evidence before the arbitrators stated:—

"The intention of the Bridge Company is to restore to the Quebec Improvement Company this part of the land on which is constructed the line leading to the Burrow Pit" also "the Bridge Company obliges itself to give to the Quebec Improvement Company a road which will lead from the land of the Bridge Company to the public road as marked on the plan"; also.

The appellants contended that these statements noted in the proceedings before the arbitrators constituted a distinct

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undertaking that the respondents would return to the appellants the land on which the temporary road to the Burrow Pit is situated and, in fact, that in terms they obliged themselves to supply the concession road.

The respondents also contended that the judgment of the Court of Appeal did not sufficiently distinguish between a *permanent* expropriation and a *temporary* expropriation—that both are provided for by the Railway Act by sections 123 and 141 and that the respondents only intended a temporary expropriation as to the third parcel—that the road marked on the plan was to be constructed by the respondents to diminish the damages that would otherwise necessarily be awarded for cutting the appellants' property in twain and completely separating one part from another.

Similar directions by the arbitrators contained in an award adopting or incorporating an undertaking on the part of the Railway Company expropriating have usually been held either to be ineffectual or if binding to take the case outside the provisions of the statute. See *Ontario and Quebec R.W. Co.* v. *Philbrick*, 12 S.C.R. 288; *Armstrong* v. *James Bay R.W. Co.* (1907), 12 O.L.R. 137, 38 S.C.R. 511, 5 Can. Ry. Cas. 306, 6 Can. Ry. Cas. 196.

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FENCES—ANIMALS AT LARGE.

BRITISH COLUMBIA.] [WILSON, Co.J.
[FULL COURT.

CORTESE v. CANADIAN PACIFIC R.W. Co.

(13 *B.C.R.* 322.)

Railways—Railway Act, R.S.C.*, 1906, *ch.* 37, *sec.* 254, *sub-sec.* 4—"*Locality*," *meaning of—Obligation of railway to fence—Animals killed by train.

Plaintiff's animals were killed on defendants' track, the right of way of which passed in front of his land. There was no fence erected on this portion of land, either by the railway company or plaintiff. The North end of the plaintiff's ranch was within 800 yards of the municipal limits of Fernie. There were about two acres of the ranch with a frontage of 450 feet on the right of way, and about 200 feet off was an enclosure used as a goat pen, about 20 by 30 feet. There was also a potato patch of about three-quarters of an acre, and a moveable fence separating this patch from a grassy portion. This, together with a piece of fencing along a waggon road, but not reaching the right of way by some 225 feet, was the only fencing on the ranch. There was evidence of scattered places in the vicinity, some being fenced and others not, but with unfenced and unoccupied land intervening:—

Held, by the Full Court, reversing the holding of Wilson, Co. J.. (Clement. J., dissenting) that as the land in question *per se* could not be classed as a settled or inclosed locality, there was no obligation on the company to fence its right of way in the absence of an order from the Board of Railway Commissioners to do so; and that their contiguity to the limits of an incorporated town did not constitute the lands a portion of the settled locality of such town.

Having regard to the powers given the Board of Railway Commissioners by sec. 254 of the Railway Act, and particularly the language of sub-sec. 4, the word "locality" must be construed without reference to the proximity of town limits.

Appeal from the decision of Wilson, Co. J., on a case stated in an action before him at Fernie on the 22nd of March, 1907. The material facts are set out in the headnote.

A. I. Fisher, for plaintiff.
Ross, K.C., for defendants.

May 4, 1907. WILSON, Co.J.:—In this matter a stated case has been presented, and I have taken a view of the premises.

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I find that the animals for the loss of which this action is brought, escaped from the plaintiff's land onto the defendants' railway track by reason of there being no fence along the railway track and were there killed by one of the defendants' trains.

If the company defendants are required to fence in that locality, I think that they are liable under the Act, as I cannot find that the animals got upon the track through the negligence, wilful act or omission of the owner and I will follow *Bacon* v. *Grand Trunk R.W. Co.* (1906), 12 O.L.R. 196, as to defendants' liability, no matter from where the animals escaped upon the company's premises. It seems to me that the intention of the Act was to fix a general liability on the defendants unless they were not required to fence.

What might be described as the general locality around Fernie, standing alone, does not come within the Act, but the locality immediately adjoining might do so by reason of its proximity to Fernie. If what is described as the "locality" of Fernie does not extend further than the limits of Fernie, the land adjoining might readily be described as not being in a settled and enclosed locality. The word improved would not apply to the locality. If the locality within the Act is governed by the city limits, then the lands lying west of the city standing alone could not come within the Act as a settled and enclosed locality. But in my view the lands to the west, including the plaintiff's, come within the limits of the settled locality of Fernie, and although the plaintiff's lands are not enclosed, they are fenced to an extent, and being settled, I find they form part of the community of Fernie. But in any case the onus is on the defendants that they come within the exception to the Act (that is, that they are not required to fence in this case) and there being a general duty cast on them, I will find for the plaintiff with costs.

The appeal was argued at Vancouver on the 29th of November, 1907, before Hunter, C.J., Morrison and Clement, JJ.

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Davis, K.C., for appellant (defendant) company, relied in the circumstances here on sub-section 4 of section 254 of the Railway Act (Dominion). In the absence of an order of the Board of Railway Commissioners the company is not bound to fence in this instance. He cited *Phair* v. *Canadian Northern R.W. Co.* (1905), 5 Can. Ry. Cas. 334, at p. 337; *Schellenberg* v. *Canadian Pacific R.W. Co.* (1906), 16 Man. L.R. 154.

Burns, for respondent (plaintiff) cited *Canadian Pacific R.W. Co.* v. *Carruthers* (1907), 39 S.C.R. 251; (1906), 16 Man. L.R. 323; and as to the meaning of locality, *Andreas* v. *Canadian Pacific R.W. Co.* (1905), 37 S.C.R. 1.

January 17, 1908. HUNTER, C.J.:—In this case the learned trial Judge had a view, and came to the conclusion that the lands lying outside of the city limits, including the lands in question, could not be classed *per se* as a settled or enclosed locality, but as he considered them to be part of the "locality" of Fernie he gave judgment for the plaintiffs. In this, I think, he was in error. Lands within the limits of a municipality other than a rural municipality are obviously governed by wholly different conditions than lands without those limits. Suppose there had been a rural municipality adjoining Fernie embracing the lands in question, I apprehend no one would ordinarily speak of them as being in the locality of Fernie, unless he meant by that to describe them as being in the neighbourhood of Fernie. But "locality" is obviously not used in the sense of neighbourhood, but to describe a portion of territory larger at any rate than a single homestead or farm. I agree with the learned trial Judge that the onus is on the company in this class of case to shew that it is not liable to fence, and I think that the Legislature by the use of the elastic word "locality" intended to leave it to the Court to say in this particular case, having regard to all the circumstances, whether the company should have fenced. And I think that the word "either" is used distributively, that for instance the Court could say where there is a settled valley on one side of

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the line and a vacant mountain on the other, that the railway might in the circumstances fulfil its obligations if fenced only on the valley side of the line. Here I think the learned Judge went wrong in considering that "locality" means neighbourhood or vicinity, and as to his finding of fact that the *locus in quo* could not by itself be classed as a settled or enclosed locality has not been successfully assailed, the appeal should be allowed and the action dismissed with costs.

MORRISON, J.:—The point of this appeal is as to the construction of sub-sec. 4 of sec. 254 of the Railway Act, being ch. 37 of the Revised Statutes of Canada, 1906.

The sub-section reads as follows:—

"Whenever the railway passes through any locality in which the lands on either side of the railway are not enclosed and either settled or improved, the company shall not be required to erect and maintain such fences, gates and cattle guards unless the Board otherwise orders or directs."

The plaintiff owns and occupies land situate about a half mile from the corporate limits of the mining town of Fernie in East Kootenay, and adjoining the defendants' railway track.

In August last some hogs and goats of the plaintiff were killed by the defendants' train opposite the plaintiff's said lands.

The matter in dispute came before the learned County Court Judge on a case stated. The findings therein are not as explicit or precise as one would wish, but taking them as they are, together with the learned Judge's findings after a view, in my opinion it is quite clear that the lands in question were not enclosed as contemplated by the Act. Apart from the meaning which he attached to the word "locality" he does not doubt that the defendants are entitled to invoke the above provision of the Act. So that the question is reduced to the meaning of the word "locality" and so counsel argued before us.

The learned Judge holds that the plaintiff's lands, on account of their proximity to the town of Fernie, are in what he terms

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the "settled locality of Fernie." I do not think the word "locality" as used in the Act can be applied to an incorporated town. The section in no way applies to an incorporated town or city, and it is not permissible to read into this section any such limitation as stated by the learned Judge.

Parliament gave the Board of Railway Commissioners the power to order fences to be built in localities, such as this one, which are within the meaning of sub-sec. 4 and which are contiguous to towns or other densely settled communities. There is, of course, no suggestion that in this instance, any such order was made.

In this case, having regard to the whole of sec. 254 and the power in sub-sec. 4 given the Board to order fences to be built, the word "locality" must be construed without any reference to the proximity of those lands to the town of Fernie.

The appeal is allowed with costs.

CLEMENT, J., dissenting:—Apart from the difficulty there is in fixing what area is covered by the word "locality," a meaning must be found if possible, for the adjectival phrase "in which the lands on either side of the railway are not improved, settled or inclosed."

To begin with the words "the lands": Do they mean all the lands? That is to say, must all the lands fall within the category of lands not improved and inclosed or not settled and inclosed before the railway company can claim exemption from the burden of fencing? I think they must, as there seems to be no warrant for, or method of, fixing any less proportion as sufficient. It is perhaps idle to speculate as to the reason why the Legislature should insist that the whole area, whatever it may be, embraced within the "locality" should consist of lands not settled, etc. One can only suggest that if in the "locality" any of the inhabitants have found it necessary to fence their dwellings and crops against cattle and other animals, the public travelling through that same "locality" must be taken to need

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protection "to prevent cattle and other animals from getting on the railway," as it is expressed in sub-sec. 2.

Then again the expression "on either side of the railway" is one not easy of interpretation; but on the best consideration I can give to it, I think "either side" is an ordinary English idiomatic expression meaning "both sides," and that the whole phrase is not limited to lands actually contiguous to the right of way. I am led to this latter conclusion chiefly by the presence of the word "inclosed," which is not in any way applicable to a piece of land one side of which abuts upon an *ex hypothesi* unfenced right of way.

On the facts set out in the special case I am of opinion that the "locality" through which the railway runs at the point in question here, is not such a locality as is referred to in sub-sec. 4 of sec. 254 as I read it. Having regard to the fact that the obligation to fence is imposed, as above indicated, to keep cattle —animals of a well-known roving tendency—off the track, I am not prepared to say that the learned County Court Judge has placed too large an area within the "locality," or that he was wrong in finding that that "locality" embraces within its bounds the southerly outskirts of the city of Fernie. Be that as it may, it is quite clear on the facts that a much smaller area might have been taken as forming the "locality" proper to be considered here, without bringing it within the exemption clause. It appears from the stated case that on the ranch itself in question there was at the time of the occurrence complained of an enclosed potato patch of some three quarters of an acre.

I would dismiss the appeal.

Appeal allowed, Clement, J., dissenting.

Solicitors for plaintiff: *Lawe & Fisher.*
Solicitors for defendants: *Ross & Alexander.*

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FENCES—ANIMALS AT LARGE.

SASKATCHEWAN.] [FULL COURT.

MURRAY v. CANADIAN PACIFIC R.W. CO.

(7 *West. L.R.* 50.)

Railway—Animals killed on track—Railway Act, 1903, *sec.* 237—*Animals "at large through negligence of owner"—Evidence—"Otherwise."*

Where horses had been placed by the plaintiff in a corral bounded on the South and West by a fence, on the East by a creek and not closed in, in any way on the North, the creek being frozen over so that the horses could pass over it, it was held that there was a wilful omission or negligence on the part of the owner within the meaning of the statute in leaving horses in such a place at night and that the owner, therefore, could not recover against the railway company.

The statute does not intend that railway companies should be insurers against any accident which may occur by reason of their trains. Some duty is cast upon the owners of all animals that are likely to be placed in danger by reason of the trains and they must take reasonable precautions to present them getting at large, so that accidents may not happen to them.

The facts are sufficiently set out in the judgment of Wetmore, C.J.

APPEAL by defendants from the judgment at the trial, so far as in favour of plaintiff.

The action was brought to recover damages for the loss of three horses alleged to have been killed by one of the defendant trains.

The trial Judge found that one of the animals was killed upon the defendants' property by one of their trains, and gave judgment as to that animal for the plaintiff. He found that the evidence did not establish that the other two animals were killed on the property of defendants, and awarded no damage in respect of them.

Allen, for defendants.

Wood, for plaintiff.

November 1, 1907.

The judgment of the Court (Wetmore, C.J., Prendergast and Johnstone, JJ.), was delivered by

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WETMORE, C.J.:—Assuming that the animal with respect to which the learned trial Judge found for the plaintiff was killed on the defendants' property and by their train, I am of opinion that the plaintiff is not entitled to recover.

This action can only be maintainable, if maintainable at all, under sec. 237 of the Railway Act, 1903. The first paragraph of that section provides that "no horses, sheep, swine, or other cattle shall be permitted to be at large upon any highway within half a mile of the intersection of such highway with any railway at rail level, unless such cattle are in charge of some competent person or persons, to prevent their loitering or stopping on such highway at such intersection, or straying upon the railway."

The second paragraph provides for impounding cattle found at large contrary to the provisions of the section.

Paragraphs 3 and 4 are as follows:—

"3. If the cattle of any person, which are at large contrary to the provisions of this section, are killed or injured by any train, at such point of intersection, he shall not have any right of action against any company in respect of the same being so killed or injured."

"4. When any cattle or other animals at large upon the highway or otherwise, get upon the property of the company and are killed or injured by a train, the owner of any such animal so killed or injured shall be entitled to recover the amount of such loss or injury against the company in any action in any court of competent jurisdiction, unless the company, in the opinion of the court or jury trying the case, establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent; but the fact that such animal was not in charge of some competent person or persons shall not, for the purposes of this sub-section, deprive the owner of his right to recover."

The horses in question were herded by the plaintiff in the daytime about one mile and a half from Regina, and at night they were brought by the plaintiff and placed in what he calls

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a "corral," bounded on the South and West sides by a fence, and on the East by a creek; on the North it was not closed in in any way. The manner in which they were placed in this so-called corral at night was by driving them over the creek, and they were taken out in the same way next morning. It was said that in order to get them across this creek it was necessary to break the ice. Horses had been placed in this "corral" for a long period, and had never prior to the occasion in question got out. The plaintiff shortly before this occasion had purchased a number of Montana horses and put them there. In fact, the larger portion of the horses of the plaintiff were these Montana horses. Somewhere between the 12th and the 18th, a very severe snowstorm arose, and the animals got out and got into the immediate vicinity of the railway track and on or about there. No person was herding them, and the animals were undoubtedly "at large" in the ordinary sense of the words. Now the question arises whether they were so at large through the negligence or wilful act or omission of the owner, because there was no other agent or custodian of the animals. Prior to their getting at large, they had been placed in the corral that I have mentioned, without any person to look after them to prevent them going at large, and they got at large by getting out of it. I am of opinion that they were at large through the wilful omission of the plaintiff. There is no affirmative evidence as to how they got out of this place where they were put at night, but the reasonable conclusion is (in the absence of any evidence to the contrary) that they got out either by the North, where there was no fence, or across the creek. There was nothing to prevent these animals getting out in either one of these ways. Of course, the North having no obstruction of any kind, they could easily get out there, and I can see nothing in the evidence to establish that this creek over which these horses had been driven regularly twice a day for some days would prevent them getting out that way. The fact that they had not got out before seems to me to be no reason why they could not and did not get out on the occasion in question. There is no evidence that any of the fence

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was broken down, and it seems to me that it is as reasonable to assume that these horses went out the way they could have readily gone out as it would be to assume where a number of horses were put in a fenced field and a panel of that field was left down, and the horses were missing, that they went out through that panel, there being no evidence that they could readily have got out any other way.

Now in this country, as elsewhere, railways have been built and are in operation, and they are a source of danger to cattle and horses running at large. The statute does not intend that the railway companies shall be insurers against any accident that may occur by reason of their trains. Some duty is cast upon the owners of all animals that are likely to be placed in danger by reason of these trains; they are to take reasonable precautions to prevent them getting at large, so that accidents may not happen to them, and, if they do not take such precautions, and accidents happen to such animals, the owner has got to abide by the consequences. I think the plaintiff in this case did not take the precautions that a reasonable man would take under the circumstances. In fact, I might say that, in my judgment, he took no precautions at all. He might as well have turned the animals loose on the open prairie. I consider the putting the animals in such a place, without its being properly enclosed, and without any person to look after them, a wilful omission, within the meaning of the section of the Act under discussion. There was no evidence of any negligence on the part of the company.

Some question has been raised by the authorities as to the meaning of the word "otherwise" at the beginning of paragraph 4 of section 237. This paragraph commences as follows: "When any cattle or other animals at large upon the highway or otherwise, get upon the property of the company and are killed."

I am of opinion that the word "otherwise" means any cattle or animals at large upon the highway or upon other places than

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the highway, as, for instance, if they were at large upon prairie land which is not a highway.

I am of opinion, therefore, that the judgment of the learned trial Judge should be reversed, and judgment entered for the defendants in the Court below, with costs, and that the plaintiff should pay the defendants' costs of this appeal.

FENCES—ANIMALS AT LARGE.

MANITOBA.] [COURT OF APPEAL.

CLAYTON v. CANADIAN NORTHERN R.W. CO.

(17 *Man. L.R.* 426.)

Railway company—Liability for animals killed on track—Animals at large through negligence of owner—Obligation to fence—Railway Act, R.S.C. 1906, ch. 37, secs. 254, 294, 427.

1. When it is proved that animals killed by a train of a railway company had been allowed to go at large on a public road through the negligence or wilful act or omission of the owner or his agent, and, in consequence thereof, got upon the right of way through a defect in the railway fence, sub-section 4 of section 237 of the Railway Act, 1903 (s. 294 of ch. 37 of R.S.C. 1906) protects the company from any claim for damages, although the company had failed to observe the requirement of section 199 (now 254) by neglecting to keep the fence along the right of way in proper repair.

Murray v. *Canadian Pacific R.W. Co.* (1907), 7 West L.R. 50; *Becker* v. *Canadian Pacific R.W Co.* (1906), 7 Can. Ry. Cas. 29, and *Bourassa* v. *Canadian Pacific R.W. Co.* (1906), 7 Can. Ry. Cas. 41, followed.

2. Said section 237 deals completely with the question of animals at large getting upon the railway track and being killed or injured, and, therefore, section 294 (now 427) being only of general application, cannot be interpreted so as to make the company liable in a case in which, by section 237, it is expressly relieved from liability.

Howell, C.J.A., dissenting.

COUNTY COURT appeal. The plaintiff sued to recover $250 damages for two horses which were killed, and a mule which was injured by an accident on defendants' line in December, 1905.

On the morning of the accident plaintiff's agent turned several of the plaintiff's horses loose in a field, from which there was, to the knowledge of both, free access to the public road through an opening in the fence left by the removal of a gate.

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The horses passed through this opening and remained at large until some time in the succeeding night, when, having entered the defendants' right of way through a defective gate, they were injured by one of the defendants' trains.

The action was tried before Judge Ryan and a jury. At the conclusion of the plaintiff's case counsel for the company moved for a nonsuit, on the ground that it appeared from the plaintiff's own evidence that the animals were at large through the negligence of the plaintiff's agent. The County Court Judge refused the nonsuit, whereupon the jury found a general verdict for the plaintiff, omitting to answer several questions framed by the trial Judge, including one as to negligence of the plaintiff.

Against this verdict defendants appealed asking that it be set aside and a nonsuit entered, or that a new trial be granted.

The appeal was heard by Howell, C.J.A., Perdue, Richards and Phippen, JJ.A., on the 10th of February, 1908.

O. H. Clark, K.C., for defendants, appellants, cited the Railway Act, R.S.C. 1906, ch. 37, sec. 294; *Yeates* v. *Grand Trunk R.W. Co.*, 7 Can. Ry. Cas. 4; *Becker* v. *Canadian Pacific R.W. Co.*, 7 Can. Ry. Cas. 29; *Biddeson* v. *Canadian Northern R.W. Co.*, 7 Can. Ry. Cas. 17; *O'Hearn* v. *Town of Port Arthur*, 2 Can. Ry. Cas. 173; *Morrow* v. *Canadian Pacific R.W. Co.*, 21 A.R. 154; and *Danger* v. *London Street Railway*, 30 O.R. 496.

J. S. Hough, K.C., for plaintiff, respondent, cited Thompson on Law of Negligence, secs. 437, 454; *Bridges* v. *North London Railway*, L.R. 7 H.L. 233; Beven on Negligence, 132; *Metropolitan Railway* v. *Wright*, 11 App. Cas. 156; *Cox* v. *English, Scottish & Australian Bank* (1905), A.C. 170; *Garrioch* v. *McKay*, 13 Man. L.R. 405; *McSloy* v. *Smith*, 26 O.R. 508.

February 29, 1908. HOWELL, C.J.A.:—From the evidence in this case and the findings of the jury it seems clear that the horses injured got upon the railway at a point along the defendants' line not at a highway intersection, but where by law the com-

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pany were required to fence by sec. 199 of ch. 58, 3 Edw. VII. (the Railway Act, 1903), and that, because of this neglect of duty, the plaintiff suffered the damages found by the jury. Let us assume for this branch of the case that the defendants at the trial established that the animals were at large when they went through the place where the defendants ought to have had a fence and got at large through the neglect of the plaintiff.

These facts require a careful consideration of sec. 237 of the Railway Act, 1903. The first and second sub-sections deal with a question of law which would be solely within the powers of the Provincial Legislature, were it not that the acts restrained or legislated upon affect Dominion railways. These sub-sections, at first glance, appear to prohibit domestic animals from being at large on a highway within half a mile of a railway crossing, and provide for their being impounded "unless they are in charge of some competent person or persons to prevent their loitering or stopping on such highway at such intersection or straying upon the highway."

It seems to me that the last few words quoted mean, straying upon the railway from the point of intersection, and that the construction to be put upon these two sub-sections is, that if some person or persons guard the crossing sufficiently to prevent the animals from stopping or loitering there or from straying upon the railway from that point, the provisions of the Act are complied with as far as having a competent person in charge. The language of the first sub-section is rather vague. Animals in charge of a competent person, although merely driven in a herd on a highway, are not necessarily at large, as that term is ordinarily used in law, for, if the animals are on the highway in charge of a competent person, they are lawfully there (and peculiarly so under the conditions in this province), and are not "at large." It seems to me that the true meaning to be put upon these two sub-sections is that domestic animals are not to be upon the highway within half a mile of the intersection, unless some person is sufficiently in charge of them to prevent them loitering on the railway crossing, or straying from there on the

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railway, and that Parliament did not really intend thereby to legislate as to animals being "at large." Sub-section 3 provides that if the animals are killed "at such point of intersection," and if the provisions of sub-secs. 1 and 2 above commented on, are not complied with, no action lies against the company. This further provision shews that the sole object of the legislation was to protect the crossings and not to legislate as to animals being at large.

If subsequent amendment can explain the legislative intent in prior Acts, sub-sec. 5 of sec. 294 of the present Railway Act shews clearly that the 3 sub-sections commented on were merely intended to protect a crossing.

It is well at this point to look at the meaning of the words "at large" used in each of the four sub-sections of sec. 237. The term "running at large" has been judicially considered in *Ibbottson* v. *Henry*, 8 O.R. 625, and in *McSloy* v. *Smith*, 26 O.R. 508, 511. In the former case a lad of 15 was herding about 80 sheep on an unenclosed parcel of land and it was held that the sheep were not running at large. In the latter case it was held that animals feeding in an enclosure were not running at large.

The terms "at large" and "running at large" are treated at considerable length in Words and Phrases Judicially Defined, Vol. I., p. 604, where a very large number of American cases are referred to; they hold that if there is a general control by voice, or by watching, or where one horse is accustomed to follow another and the former is controlled, or where the dam is being driven and the colt follows and is stampeded, or where a dog is playing with its master's child, or when domestic animals escape and are pursued, the animals are not at large or running at large within prohibitions of statutes. In 1890 there was an amendment to the Railway Act making the railway company liable where animals were running at large pursuant to a local by-law permitting it, and were injured. This is referred to and the authorities cited in *Carruthers* v. *Canadian Pacific R.W. Co.*, 16 Man. L.R. at p. 327, 4 W.L.R. 441. In the revisions of the Railway Act since then that particular clause is not repeated.

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It is well known that the tendency of legislation is towards the creation of liability against railway companies where damages are caused by breach of their duties, and I would not expect to find in the present statute that the company are relieved from liability where animals, lawfully running at large, are killed because of a breach of duty of the company in keeping up a fence not at a crossing, and I look for the continuance of this liability in the very inclusive language of the statute.

Sub-section 4 of sec. 237 must now be considered. It declares, as explained in *Carruthers* v. *Canadian Pacific R.W. Co.*, 39 S.C.R. 251, that where animals at large get on the railway and are killed, the company is liable, and it is no defence to shew that they were not in charge of a competent person, but the company have a good defence if they establish "that such animal got at large through the negligence or wilful act or omission of the owner."

Where the animals got at large without the negligence of the owner, this sub-section, as explained by the last mentioned case, creates a clear liability, and no other portion of the Act need be invoked.

Where, however, animals get at large because the owners have not kept up their fences or carefully kept their gates shut, and they wander to a railway, justified perhaps by a local by-law, and because the company have not performed a duty which the statute in clear terms imposes on them, and the cattle are killed, it seems strange if Parliament did not intend to create a liability.

Section 199 requires the railway company to fence and put up gates, and if, because of default in this duty, damages arise to an adjoining owner, they are liable, and in the case of *Carruthers* v. *Canadian Pacific R.W. Co.*, 16 Man. L.R. 323, 4 W.L.R. 441, I held that, owing to the changes in the Railway Act, a new principle was established, and that the duty to fence was one which the company owed not alone to the adjoining owner but to the public generally. At the time of that decision the ill-expressed language in sub-sec. 4 of sec. 237, "at large

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upon the highway or otherwise," had not been judicially explained and commentators and lawyers differed as to its meaning. When the case went to appeal, the Supreme Court gave such a meaning to them that in that case the relief was clear under that sub-section. Liability under sec. 199 and my remarks as to the duty to the public thereunder were neither affirmed nor dissented from; to these views I still adhere.

Where a statutory duty is imposed and damages arise from a breach of that duty, the law implies a liability, as is shewn in the numerous cases collected in Mac-Murchy & Denison's Canadian Railway Act Annotated, p. 350, but it seems to me the statute has directly legislated upon this point. Section 294 declares that if the company fails to comply with the requirements of the Act, they are liable to any person injured thereby for the full amount of damages sustained by such act or omission, and probably this was done to make the law clear on the point. This section was not cited or referred to on the argument, and at first glance it occurred to me that the words "person injured" referred solely to bodily injury, but on reflection I am satisfied that this narrow construction was not the intention of Parliament. This is the view also taken by a Divisional Court in *Plester* v. *Grand Trunk R.W. Co.*, 32 O.R. 55. If I am correct in this conclusion, then, by virtue of secs. 199 and 294, the plaintiffs are entitled to recover, unless the plain provisions of these sections are made nugatory by sub-sec. 4 of sec. 237.

To return again to the consideration of sub-sec. 4: is it to be said that this sub-section is a limitation of the liability to fence, and that where cattle may lawfully run at large pursuant to legislation which the province alone can enact, the company are not bound to fence in any way as against them? I should look closely at the Act before arriving at that conclusion.

Suppose the animals get at large within this sub-section without any default of the owners, the liability is complete under the sub-section, and the company have no defence, although they have fenced as required by the first two sub-sections of sec.

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199. The company are given the defence of negligence of the owner, but is liable under this sub-section, although their fences are sufficient under sec. 199, or although it is not required to fence under sub-sec. 3 of that section. It seems to me that the statute might be consistently read so as to give a meaning to both these sections by holding that if cattle get at large without the plaintiff's "negligence, wilful act, or omission," and are injured on the railway, not at a crossing, the company are liable, whether they have fenced under the first two sub-sections of sec. 199, or have not fenced under the third sub-section, and it is not unreasonable to think that it was considered just that if a railway company was not put to the expense of fencing in our prairie country to protect cattle from the dangers of their line, or if they fenced only as required by the Act, they should pay the damages where animals got out of control without the owner's fault. Consistently also it could be held that where animals were allowed to run at large, or were at large by the owner's neglect, he took the risk of their being injured where the company were not bound to fence under the third sub-section, and so that company would not be liable, nor would they be liable where they had fenced within the requirements of the two first sub-sections, and it would follow that where cattle were at large and were injured because of the breach of their duty to fence as required by these sub-sections, the company is liable, and that is my view of the true meaning of the Act.

I have not overlooked the case of *Yeates* v. *Grand Trunk R.W. Co.*, 7 Can. Ry. Cas. 4. It seems clear that any remarks made in that case on this subject are purely *obiter*. The case of *Becker* v. *Canadian Pacific R.W. Co.*, at page 29, does not differ from my view of the law. There the fences were in good repair, and the plaintiff was negligent. The case of *McDaniel* v. *Canadian Pacific R.W. Co.*, at page 34, and *Bourassa* v. *Canadian Pacific R.W. Co.*, at page 41, take a contrary view of the law, but, with the great deference, it seems to me that the attention of the Judges was not called to the conflicting sections, and none of

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them considered sec. 294, nor was there an effort to harmonize the conflicts in the various sections.

It may be urged that to hold that under certain circumstances the company are liable for injury to cattle, although they had complied with the provisions as to fencing, is unreasonable; but I find a provision as to liability for fires in sec. 239 equally unreasonable, and it shews that Parliament intended that where a citizen, without default on his part, suffered damages because of the dangers incident to a railway, although the company had complied with all the requirements of the Railway Act, the company should make good the loss. The company are liable for loss by fire under sec. 239, no matter what care they take, and similarly liable under sec. 237, sub-sec. 4, for damages to cattle, although they have fully complied with sec. 199 as to fencing, if the plaintiff has not been negligent in allowing his cattle to get at large; but this leaves untouched the liability of the company for injury to cattle caused by their neglect in fencing, which neglect was the prime cause of the injury.

To put any other construction than this upon sec. 237 is, so far as the three prairie provinces are concerned, with their network of railways, a declaration that Parliament intended thereby to prevent cattle running at large and to interfere seriously with one of the great industries.

The appeal should be dismissed with costs.

PERDUE, J.A.:—The provisions of the Railway Act, 1903, apply to this case. By sec. 199 of that Act the railway company is compelled to erect and maintain fences on each side of the railway with swing gates in such fences, except in localities where the land on either side is not improved or settled. The locality in question was not one to which the exception applied. The consequences to the railway company where it has failed to comply with that provision and where animals at large get upon the railway and are killed or injured, are declared by sub-sec. 4 of sec. 237. The meaning of that sub-

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section has been determined by the Supreme Court of Canada in *Carruthers* v. *Canadian Pacific R.W. Co.*, 39 S.C.R. 251. The sub-section, although differing somewhat in its wording from the corresponding provision in R.S.C. 1906, ch. 37, sec. 294, sub-sec. 4, refers to animals at large, whether upon the highway or not. It declares that the owner of any animals so killed or injured shall be entitled to recover the amount of his loss against the railway company, subject to exceptions which do not apply in the present case, unless the company establish that the animal got at large through the negligence or wilful act, or omission, of the owner.

The evidence adduced by the plaintiff clearly proves that the animals that were killed or injured got at large by reason of his negligence. The defendants are, therefore, not liable under sub-sec. 4 of sec. 237.

Section 294 of the Railway Act, 1903, provides that where the railway company does anything contrary to the provisions of the Act or omit to do anything required to be done on the part of the company, the company is liable to any person injured thereby for the full amount of damages sustained by such act or omission. I do not think that this section applies to the present case. Section 237 deals completely with the question of animals at large getting upon the railway track and being killed or injured. The section provides the whole remedy to which the owner shall be entitled in such a case and the circumstances under which he can recover. Sub-section 3 of that section declares that where cattle at large contrary to the provisions of the section are killed or injured by a train at the intersection of a highway, the owner shall have no right of action against the railway company, and this notwithstanding that the company are bound by sec. 199 to maintain fences and cattle-guards. If, therefore, sec. 294 applies in every case of omission by the company to comply with the provisions of sec. 199 and gives a right of action to a person sustaining injury thereby, the owner of cattle at large near a crossing, contrary to the provisions of sec. 237, might maintain an action against the com-

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pany if they had failed to safeguard the crossing as required by sec. 199, and this although sec. 237 expressly deprives him of any right of action in such a case. This would involve a direct conflict between two sections of the Act. The rights and liabilities of the railway company in respect of animals at large are declared by sec. 237, and no section of general application contained in the Act should add to or interfere with the specific provisions respecting that subject contained in the section specially framed to deal with it.

In reference to sec. 294, I would not desire to be understood as positively holding that a person may in any case recover under that section for injury done to his property.

I think the appeal should be allowed and a nonsuit entered.

PHIPPEN, J.A.:—Plaintiff contends that, under the authority of such cases as *Bridges* v. *North London R.W. Co.*, L.R. 7 H.L. 213; *Metropolitan R.W. Co.* v. *Wright*, 11 App. Cas. 156, and *Cox* v. *English, Scottish and Australian Bank* (1905), A.C. 168, the verdict should not be disturbed by an appellate Court.

The liability of the defendants arises under sub-sec. 4 of sec. 237 of the Railway Act, 1903. That section is, in part, as follows: "When any cattle or other animals at large upon the highway or otherwise, get upon the property of the company and are killed or injured by a train, the owner, . . . unless the company . . . establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent." This section has been interpreted in *Carruthers* v. *Canadian Pacific R.W. Co.*, 39 S.C.R. 251, as having the meaning of the corresponding section (sub-sec. 4 of sec. 294) of the Railway Act, R.S.C. 1906.

Railway companies are not liable for all damages occasioned through defective fences. Animals injured while at large through the negligence or wilful act or omission of the owners are not protected. The Act imposes a duty on owners, in so far at least as they may seek its protection, neither negligently or wilfully to permit their animals to stray.

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The onus of establishing such negligence is thrown upon the company. Once it appears that the injured animal got upon the railway through a defective fence, a statutory responsibility arises, unless the company can establish that the animal was at large through wilful act, omission, or negligence.

The duty of the plaintiff, in so far as he claims the protection of the Railway Act, is neither wilfully nor negligently to allow his animals to be at large. According to his own testimony, testimony neither contradicted by witnesses nor limited by inference, testimony brought out by his own and not opposing counsel, day after day he turned his animals loose in a field open to the road, he allowed them to roam the highway at will, he placed no watch or check upon them, the only restrictions on their movements being their habits and inclinations. To quote the plaintiff's own language in part: "We did not attempt to keep the horses from going on the road. The horses were stabled at night and were allowed out during the day. Generally in the field, sometimes they went on the road as the gates were down to avoid drifts of snow. The horses were turned out in the morning, and they could run." And as Harris, the servant man, says in cross-examination: "Horses require quite a lot of watching. I did not watch the horses that day, I did not look for them until night."

Under these admitted facts, the jury, ignoring the learned trial Judge's question as to whether the horses were at large through the plaintiff's negligence, found a verdict against the railway.

In *Murray* v. *Canadian Pacific R.W. Co.*, 7 West. L.R. 50, Mr. Chief Justice Wetmore held that horses leaving a field, fenced on three sides only, in which they had been placed by their owner, were at large through wilful omission.

In *Becker* v. *Canadian Pacific R.W. Co.*, 7 Can. Ry. Cas. 29, Mr. Justice Harvey held as to animals somewhat similarly placed, (p. 33): "But, even if it were not negligence, it was the wilful or deliberate act of the plaintiff in putting the animals where he did that was the cause of their getting at large, if in-

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deed they were not at large in that pasture, and therefore they were at large through the negligence or wilful act or omission of the plaintiff."

Bourassa v. *Canadian Pacific R.W. Co.*, 7 Can. Ry. Cas. 41, is to the same effect.

I agree with the conclusions arrived at in these cases. Where an animal, deliberately placed in a field with an open space to the highway, is left to its own inclinations, and chooses, as it may, without restraint to walk abroad, it is, a matter of law, quite as much at large through wilful act as if originally turned loose upon the road.

These facts being admitted by the plaintiff, the learned trial Judge should have entered a nonsuit. I have not discussed the question of liability under sec. 294, as it was not argued at Bar.

I would allow the appeal and order a nonsuit to be entered, with costs to the defendants both of the trial and of the appeal.

RICHARDS, J.A., concurred with Perdue and Phippen, JJ.A.

Appeal allowed.

NOTES.

The cases of *Cortese* v. *Canadian Pacific R.W. Co.*, *Murray* v. *Canadian Pacific R.W. Co.* and *Clayton* v. *Canadian Northern R.W. Co.*, here reported, with the cases previously reported, *supra* pp. 4-47, and the cases reported in vol. 6, pp. 1-50, bring the decisions upon the sections of the Railway Acts 1903 and 1906, relating to fencing and animals at large up to the present time.

According to the opinions of the majority of the learned judges, the provisions of section 294 of the Railway Act (former section 237) cannot be made use of to enlarge the liability of the railway company under section 254 (former section 199), and even though the company has not complied with the obligation to fence, if the animals escaping on to the railway are at large through negligence on the part of the owner, he cannot recover for their loss.

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TRANSFER OF SHARES—MANDAMUS.

ONTARIO.] [DIVISIONAL COURT.

NELLES

v.

WINDSOR, ESSEX AND LAKE SHORE RAPID R.W. CO.

(16 *O.L.R.* 359.)

Company—Shares—Transfer on company's books—Mandamus to enforce Transfer—Interlocutory order.

The owner of two shares of stock in the defendants' railway, assigned them to the plaintiff, endorsing the assignment on the certificate. The plaintiff called at the head office and demanded that the necessary transfer should be made on the company's books, and also saw the President; and after some correspondence, the transfer not having been made, he procured a duplicate assignment of the stock, and placed the matter in the hands of his solicitor, who thereupon wrote the company demanding a transfer, and enclosed one of the duplicate assignments, and stated that he would attend on a named hour, ready to surrender the certificate, and have the transfer completed, and, on receiving a reply that it could not then be attended to, this action was brought, in which an order for a mandamus was claimed.

An interlocutory order made by a Judge in Chambers directing a mandamus to issue, was, on appeal to the Divisional Court, set aside, and the matter left for decision at the trial.

AN action was brought by Alexander I. Nelles claiming mandamus to compe' the defendants to have executed and entered in their stock transfer book the transfer to the plaintiff of two shares of the capital stock of the defendants' company purchased by the plaintiff from one John N. Emery, on the 3rd day of January, 1908; and thereupon a motion for the mandamus was made on affidavits to a Judge in Chambers.

The motion was heard before BRITTON, J., in Chambers, on February 11th, 1908, in whose judgments the facts are stated.

G. J. Leggatt, for the plaintiff.

Matthew Wilson, K.C., for the defendants.

February 24, 1908. BRITTON, J.:—Emery held the defendants' certificate, No. 24, for two shares, and the transfer was made by Emery by indorsement upon this certificate.

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This certificate, so far as material, is as follows:—

"This certifies that Jno. N. Emery is the owner of two fully paid shares of the capital stock of Windsor, Essex and Lake Shore Rapid Railway Company, transferable only on the books of the corporation by the holder hereof in person, or by attorney, upon surrender of this certificate properly indorsed."

It is dated 28th March, 1906. The shares are for $100 each.

The indorsement is as follows:—

"For value received, I hereby sell, assign and transfer unto Alexander I. Nelles, of Windsor, Ontario, two shares of the capital stock represented by the within certificate; and do hereby irrevocably constitute and appoint the said Alexander I. Nelles my true and lawful attorney to transfer the said stock on the books of the within named corporation, with full power of substitution in the premises."

Dated January 3rd, 1908.

The transfer as indorsed was duly executed, and later on another one was executed but dated the same day and called a duplicate transfer.

On the 4th January the plaintiff took the certificate to the head office of the company at Windsor, and demanded a transfer of these shares, but was informed that none of the officials of the company were then at the office, and the person in charge said he would write to the secretary about the matter.

The plaintiff did not leave the certificate or transfer at the head office of the company.

The plaintiff says that on the 9th January he "tendered the said certificate to the president" of the company, and requested him to have the transfer made; and the plaintiff says that the president peremptorily refused to do so, and when asked for his reason declined to give any.

The defendants' explanation of this, as stated in the affidavit of John Piggott, the president, is that although the plaintiff stated he had purchased two shares of Emery's stock, and that he wished

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to have them transferred to him, he did not produce or exhibit the certificate or any transfer of the shares, and that as "the stock certificate and transfer book was not there," and as he had never "recorded or entered any transfer of stock, and not supposing it was his duty to do so, without at least being so directed by the board of directors," he said to the plaintiff that he was not then prepared to enter a transfer of the stock, "and the plaintiff turned around and walked out."

The president says he did not intend any unqualified refusal, and he thinks that the plaintiff did not then so understand the language or attitude of the president.

The president states that the defendants have "no desire to overlook the plaintiff's right of transfer of stock, if such right exists, nor to prevent the plaintiff from attending any meeting of the shareholders of the defendants, nor in any other way to refuse the plaintiff his rights in the premises."

The plaintiff then obtained a duplicate of the transfer, so as to comply with the Dominion Railway Act, and placed the matter in the hands of his solicitor to get the necessary transfer on the books of the defendants.

The solicitor of the plaintiff wrote to the secretary of the defendants at Chatham on the 10th January. On the 16th January he wrote to Charles Magee as vice-president, but who was not in fact vice-president. On the 24th January the plaintiff's solicitor enclosed the duplicate transfer to the secretary of the defendants, again addressing him Chatham. On the 24th January the secretary wrote to the plaintiff's solicitor stating his intention to lay the matter before the board of directors at their first meeting. A meeting of defendants' directors was held at Windsor on the 28th January, and a resolution was passed that the secretary notify the plaintiff of the purport of clause 11, sub-clauses d. and e., of the by-laws, and request him to produce evidence of the assignment, and to surrender the old certificate, so that certificate might be prepared and issued in the name of the assignee.

Clause "d," so far as material to the present discussion, is that "no shareholder shall be entitled to receive a second or subsequent

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certificate until he shall have delivered up to the company all prior certificates received by him from the company for the same stock."

Clause "e," so far as it refers to shares not fully paid, has no reference to the two shares in question. If it is intended by this clause, as to recording, to refer to all shares, it is simply that, "such transfers shall be recorded in a book provided for the purpose, and signed by the shareholder, and his transferee in person or by attorney, and duly witnessed and, if signed by attorney, the power of attorney shall be filed with the secretary."

The plaintiff's solicitor wrote on the 29th January to the secretary, stating that the transfer was sufficient evidence to authorize the transfer; that it was all the Act required in the case of paid-up stock; that, in his opinion, the company was "quibbling," and stating that he would attend on the following Friday at noon prepared to surrender the plaintiff's certificate, and complete the transfer. A reply to this letter stated that the members of the board had an important engagement at Chatham on that Friday, but the treasurer promised to take the matter up with a view to having it adjusted in a manner satisfactory to the plaintiff.

On the 4th February the writ herein was issued for the order by way of mandamus.

I am utterly unable to see why any difficulty should have arisen about the transfer of these two shares on the books of the company.

The shares are said to be of little pecuniary value, and that they are at present of any real value to the plaintiff for voting purposes was denied by the defendants' counsel. Why, then, such haste by the plaintiff, and why such hesitancy and dallying on the part of the officers of the defendants? The matter is, however, in court, and each party is standing upon his strict rights. I think the defendants are to blame, and that the plaintiff is entitled to the order asked.

This is not a case of conflicting claims of interest. No person is setting up any claim adversely to the plaintiff, or objecting to the transfer. It is not a question of an equitable assignment against the formal legal one.

The authorities are that "even if a transfer is in order, and if it is

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accompanied by the certificate, the company are not bound to register it at once." . . . "They are entitled to delay for a reasonable time, and make reasonable inquiry before registration."

In this case the defendants had reasonable time before action by the plaintiff. The plaintiff and his solicitor were known to at least some of the members of the board. Any proper inquiry could have been made within two or three days. The plaintiff's solicitor is a subscribing witness to the duplicate transfer.

There was in my opinion, according to the authorities, a sufficient demand made upon the defendants, and a refusal by them. Although the defendants now say they had no wish to refuse compliance with plaintiff's request, I find a difficulty in determining just what the defendants wanted, and I can only interpret their action and their delay as a refusal.

It was argued that no transfer on the books of the company was really necessary, and therefore an order for mandamus should not issue. *Crawford* v. *Provincial Ins. Co.* (1859), 8 U.C.C.P. 263, at p. 268, was cited as authority for this. That objection is not open to the defendants. They have issued their certificate for shares, which shares they say are only transferable on the books of the company, by the holder in person or by proxy. The plaintiff is entitled to have the terms of that certificate complied with by the defendants.

It was argued for the defendants that no action would lie but, if it would, the plaintiff must wait until the trial, and get his judgment in the ordinary way.

A mandamus will be granted in an action if the plaintiff shews that he will suffer some injury by waiting for the result of the action. If the plaintiff is entitled to be registered as a shareholder, *primâ facie* he will suffer at least a deprivation of his rights in not being allowed to vote on these shares at a meeting of the shareholders to be held before the trial of the action can be had.

If I had come to the conclusion that the action was wrongly brought, and that the plaintiff's relief, if entitled to any, was by getting the prerogative mandamus, I would have followed *Toronto Public Library Board* v. *City of Toronto* (1900), 19 P.R. 329, and have directed the affidavits to be re-sworn, and the motion turned

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into a summary one for that order, but I do not come to that conclusion.

The whole law and procedure in regard to mandamus is changed by sec. 58, sub-sec. 9, of the Judicature Act, and by Rules 1080 to 1093 inclusive.

"A mandamus may be granted by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made": sec. 58, sub-sec. 9.

"An interlocutory order means not merely an order between writ and final judgment, but an order other than final judgment": Holmested & Langton, p. 76.

I think it just that the order should be made. There appears to me no reason why the plaintiff should have the completion of the transfer of his two shares of stock delayed.

The order will be for mandamus to the defendants by their proper officers, and in their book of transfer, to record the transfer to the plaintiff, to be executed, transferring the two shares of the capital stock of the defendants' company purchased by the plaintiff from the said John N. Emery, and as represented by certificate No. 24, upon the certificate being surrendered by the plaintiff.

From the attitude of the defendants upon the argument it will probab y not be necessary for an order to be taken out, but, if it is, and if there is any difficulty about the terms, the minutes may be spoken to. The plaintiff is entitled to costs, but it is a case in which I should fix the amount, and I do at $25.

From this judgment there was an appeal to the Divisional Court.

On March 16th, 1908, the appeal was heard before BOYD, C., MAGEE and MABEE, JJ., when the same counsel appeared.

At the conclusion of the argument the judgment of the Court was delivered by BOYD, C.:—The case is not of such extreme urgency as to call for summary action, particularly in the face of conflicting affidavits.

The dispute as to whether there was unreasonable delay will be better disposed of on *viva voce* evidence if the case is prosecuted.

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There will be judgment allowing the appeal, and vacating the order; costs reserved. If the transfer should be made pending the trial, the question of costs to be disposed of by a Judge in Chambers.

NOTES.

Transfer of Shares—Mandamus. The formalities attendant on the transfer of shares under the Railway Act are now to be found in Revised Statutes of Canada, ch. 37, secs. 86 to 92, taking the place of the Railway Act, 1903, secs. 95 to 99. The provision referred to by Mr. Justice Britton in the case now reported requiring the tender of a duplicate transfer is contained in section 87 of the present Act. The remedy by application for a writ or order of mandamus has been frequently invoked, see for instance, *The Queen* v. *Lambourn Valley R.W. Co.*, 22 Q.B.D. 463, where a prerogative writ of mandamus was refused as the prosecutor had another specific and sufficient remedy, namely, by action of mandamus. This case came in for some discussion in *The Queen* v. *London & North Western R.W. Co.* (1894), 2 Q.B. 512, where it was laid down that the Court will not refuse to grant a prerogative writ of mandamus in every case in which an action of mandamus would lie, and Mr. Justice Wright there says, at p. 518, in speaking to the *Lambourn Case*, "Of course we deal with that case with all possible respect as a decision which binds us on a matter *in pari materia*, but there the Court was not dealing with a question of this kind. The decision in that case I have never heard questioned as a decision, and I do not suppose it ever will be. It was a dispute whether an action or a prerogative writ of mandamus was the proper remedy in that particular case. But Pollock, B., in the course of his judgment, appears to say that it is an answer to any application for a prerogative writ of mandamus if it is shewn that a mandamus could have been granted for the same purpose in an action. I say, and I have said with the assent of other Judges at various times, that that would be unduly to narrow the power of this Court to grant a prerogative writ of mandamus. There must be many cases in which a prerogative writ of mandamus ought to be granted for the purpose of speedy justice or other reasons in which it would be uncertain whether it was possible to achieve the same results in any other way, and if it were possible would take much time and difficulty." This

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subject has also been recently discussed in *Rex* v. *City of London Union* (1907), 2 K.B. 764, where it was held that mandamus ought not to issue inasmuch as there was another legal and effective remedy. For other earlier cases on this question, see Canadian Railway Act (Annotated) page 124. Similar questions have arisen upon motions by bond holders to compel the registration of themselves for purposes of voting under the provisions of what is now R.S.C. ch. 37, sec. 143, and where summary order of mandamus has been considered necessary for the protection of bond holders and in order to enable them to vote at an approaching meeting, it has been granted. *Re Thomson and Victoria R.W. Co.*, 8 P.R. 423; *Re Osler and Toronto, Grey & Bruce R.W. Co., ib.*, 506; *Re Johnson and Toronto, Grey & Bruce R.W. Co., ib.*, p. 535; *In re Panton and The Cramp Steel Co.*, 9 O.L.R. 3, a case under the Ontario Companies Act, an order of mandamus was granted where it was necessary that the transfer should be made in order to enable the transferee to vote at an approaching annual meeting, and there was no formal by-law of the company authorizing the directors to close the transfer books of the company for any specified time prior to the meeting. In *Re Robertson and Grand Trunk R.W. Co.*, 6 Can. Ry. Cas. 490, the practice of granting a prerogative writ of mandamus was again considered and it was there laid down by Mr. Justice Teetzel that two questions must be found in favour of the applicant before a prerogative writ of mandamus can issue. First, has the applicant a specific legal right to the performance of some duty by the respondent, and second, will the applicant without the benefit of the writ be left without effectual remedy.

NEGLIGENCE—CONDITION—NOTICE OF CLAIM.

ONTARIO.] [DIVISIONAL COURT.

SHEPPARD v. CANADIAN PACIFIC R.W. Co.

(16 *O.L.R.* 259.)

Railways—Carriage of Goods—Loss of Boxes Shipped—Condition of Contract—Necessity for Notice of Loss.

One of the conditions of a railway way-bill was that there shall be "no claim for damage for loss of or detention of, or injury or damage to, any goods for which

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the company is accountable, unless and until notice in writing and the particulars of the claim of said loss, damage, or detention, are given to the station freight agent at or nearest to the place of delivery within thirty-six hours after the goods in respect of which said claim is made, or such portion of them as are not lost are delivered."

Two boxes of blankets shipped by the plaintiff were re-shipped by the railway to the original place of shipment, and an advice note of their arrival sent to the plaintiff, which stated that there was "one box short":—

Held, that under the terms of the condition the box could not be said to be "lost," and notice in writing by the plaintiff to the defendants, within the thirty-six hours of the receipt of the advice note of the loss of the box, was not essential to entitle the plaintiff to recover its value.

THIS was an appeal from the District Court of the district of Nipissing.

The junior Judge of that district, before whom the action was tried upon a statement of the facts agreed upon by counsel, came to the conclusion that the appellant's action failed, and dismissed it.

On January 27th, 1908, the appeal was heard before MEREDITH, C.J. C. P., ANGLIN, and MABEE, JJ.

W. E. Middleton, K.C., for plaintiff, appellant.

White, K.C., for defendants, respondents.

January 28, 1908. The judgment of the Court was delivered by MEREDITH, C.J.:—The plaintiff sues to recover the value of a box of blankets which was delivered by him to the respondents to be carried from Webwood in the Algoma District, to Norwich, in the United States. When the goods reached Iberville, near the frontier,—they went in bond,—a difficulty arose about taking them across the line, and in the end by direction of the appellant they were shipped back in bond over the respondents' line to the point of original shipment, and were taken out of bond by the appellant, at Sudbury.

The date when the goods reached Webwood, or such of them as did reach that point, is uncertain. It is stated on the advice note to have been about the 9th November, but nothing very much turns upon that.

The goods apparently were accompanied by a way-bill, and upon the arrival of such of them as did arrive at Webwood, an advice note was sent by the respondents to the appellant, which set out that the goods were billed from Iberville, and that they

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consisted of two boxes of blankets, and there is a charge for advanced freight and customs, making in all $10.73; and at the foot there is a memorandum in these words, "Box short."

In point of fact, as I have said, only one box arrived at that time.

According to the statement of facts, the appellant when he received the goods which came informed the agent of the respondents of what the contents of the box consisted and the value of them; but no written notice was given within 36 hours of the delivery of the box that was delivered of any claim in respect of the other box. These are, I think, the material facts which appeared before the learned Judge of the district court.

The respondents rely upon the twelfth condition, it being admitted that a receipt was given for the goods in the terms of a blank form which was put in, and these conditions, it is also shewn, have been approved by the Dominion Board of Railway Commissioners. The twelfth condition provides that "There shall be no claim for damage, for loss of, or detention of, or injury or damage to, any goods for which the company is accountable, unless and until notice in writing and the particulars of the claim of said loss, damage or detention, are given to the station freight agent at or nearest to the place of delivery within thirty-six hours after the goods in respect of which said claim is made, or such portions of them as are not lost are delivered."

It will be observed that the language, as far as applicable to the case with which we are dealing, is "loss," "lost," "damage for loss of," "such of them as are not lost"—and the question is whether these goods were within the meaning of this condition lost, so as to require the appellant within 36 hours after the goods that arrived were delivered to him, to give notice in writing of his loss.

We are of opinion that the condition does not apply in the circumstances of this case. Putting it at the highest in favour of the respondents, there was no statement that the other package was lost, and it would appear not an unreasonable inference, having regard to the memorandum upon the advice note, that the goods were not lost, that this was an explanation that the goods had not

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arrived, that the other box had not come with the box that came at that time, but there was nothing to indicate that it was lost, and nothing to indicate that it was not on its way and would not be delivered at a later time.

If the contention of the respondents as to the effect of the condition is right, it would mean that whenever a consignee receives an advice note with regard to ten, twenty, fifty or one hundred boxes of goods, and only part of them come in the car or by the train the arrival of which leads to the giving of the advice note, the consignee would be bound at the risk of losing his remedy, in the event of it turning out that the goods were lost, to give the notice within 36 hours. That would seem to be an unreasonable state of things, and one that would put business men and the railway company to a great deal of trouble; and bearing in mind the rule that these conditions are to be construed strictly, and, where there is doubt, to be construed against the railway company—the persons claiming the benefit of them—we think that the words of this condition do not apply to the goods which are the subject of the claim.

Further questions were raised, one as to the validity of this condition, but in the view we have taken it is not necessary to determine it.

In the case of *Hayward* v. *Canadian Northern R.W. Co.* (1906), 4 W.L.R. 299, it was held by the full court of King's Bench of Manitoba, that the approval of the Railway Commission of a condition prevented the application of sec. 214 of the Railway Act, 1903, 3 Edw. VII., ch. 58 (D), which provides that "Every person aggrieved by any neglect or refusal in the premises shall, subject to this Act, have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servants."

Speaking for myself, and assuming that the case is intended to apply to a condition which in terms restricts the liability of the railway company, I should desire further consideration before I adopted it as being a correct statement of the law.

The result is that the appeal is allowed and the judgment

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below is reversed, and there will be substituted for it judgment for the plaintiff for the value of the goods with costs, and the appellant will have the costs here and below.

I may mention that this case comes up most irregularly from the district court. The pleadings and proceedings are not certified, as required by the Act. A number of papers are here without any marks upon them shewing that they were filed as exhibits. There is in the admitted statement of facts a statement that six exhibits were put in at the trial, but nothing appears to shew what they were, and one is left to find it out from an examination of the documents. I think the attention of the Inspector should be called to this, in order that the local officer may be informed of his failure to comply with the Rules of Court and the provisions of the statute.

NOTES.

Condition Requiring Notice of Goods Being Lost: This being a somewhat stringent provision it has usually received but little favour from the Courts, and the wording has been generally so construed as to hold that it does not apply to the particular case under discussion and, therefore, does not avail the carrier as a defence. A recent example of this is the case of *James* v. *Dominion Express Company*, 6 Can. Ry. Cas. 309, where it was held that a provision requiring that notice of loss be given to the company "at this office" did not necessarily mean the office where the contract was made and the receipt issued, but might include the company's head office. Where, however, there is no statutory restriction upon the power of a carrier to make contracts exempting him from liability and where he contracts for notice of loss in apt words such a provision is undoubtedly valid. *Northern Pacific Express Co.* v. *Martin*, 26 S.C.R. 135. Under the Railway Act the right to make such contracts is governed by two sections, first; section 284, providing that no notice, condition or declaration shall relieve companies affected by the Act from liability for failure to comply with the provisions of that section if the damage arises from any negligence or omission of the company or its servants, and second; section 340, providing that no contract, etc., limiting the company's liability shall relieve it from such liability unless such class of contract,

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etc., shall have been first authorized or approved by order or regulation of the Board.

A question has sometimes arisen under the above two sections whether when the Board has approved of a form of contract under the provisions of section 340, the company can claim relief from liability for damages, even if it has been negligent. *In Buskey* v. *Canadian Pacific R.W. Co.*, 5 Can. Ry. Cas. 384, the apparent result of the decision would be that in case of such approval the railway company would not be responsible for negligence, notwithstanding the provisions of what was then sub-section 3 of section 214 of the Railway Act of 1903, now section 284 above referred to; but in the cases of *Booth* v. *Canadian Pacific R.W. Co.*, 5 Can. Ry. Cas. 389, and *Costello* v. *Grand Trunk R.W. Co.*, 7 O.W.R. 846, it was held that there was nothing in the Act as it then stood which would permit the Board of Railway Commissioners to approve of a contract which relieved the railway company from liability for negligence and it was held that notwithstanding the approval of such contract by the Board, the company still remained liable where it was shewn that the damages complained of were the result of negligence. The case of *Hayward* v. *Canadian Northern R.W. Co.*, cited in the judgment now reported, which is also reported in 6 Can. Ry. Cas. 411, differs from these decisions in that it holds that reading the two sections together the approval of the Board would permit a company to enter into a contract relieving it from liability for negligence. Whether this decision will be followed in Canada remains somewhat in doubt, owing to the position of the cases and the remarks of the Court in the appeal in the *Sheppard Case*. It is to be observed that sub-section 7 of section 284 differs considerably from sub-section 3 of section 214 of the Railway Act of 1903, and the provision that the company should not be relieved by contract from any negligence or omission on its part is limited in express terms to cases of failure to comply with the provisions of the section. In affect, however, it will probably be found that there is no substantial difference between the Act of 1903 and the Act of 1906. Upon this particular point it must also be noted that such cases as *Northern Pacific Express Co.* v. *Martin*, and *James* v. *Dominion Express Co.*, cited in these notes, are now no longer law owing to the enactment of 6 Edw. VII. ch. 42, now R.S.C. ch. 37, sec. 353, providing in substance that no contract, etc., by any company or person or corporation charging express tolls, impair-

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ing, restricting or limiting liability with respect to the collecting, receiving, caring for or handling of goods by express shall have any force or effect unless approved by the Board. While this clause roughly corresponds with section 349 of the Railway Act requiring the Board to approve of the form of contracts with railway companies, there is no such clause as section 284 which totally forbids a contract exempting a railway company from liability for its own negligence. The question, therefore, which arose in the *Booth* and *Costello Cases* can hardly arise where express companies are involved because, apparently, the latter may yet obtain exemption from liability for negligence provided the Board approves of the form of the contract.

HIGHWAY CROSSING—NEGLIGENCE—NONSUIT.

ONTARIO.] [DIVISIONAL COURT.
[COURT OF APPEAL.

MOIR v. CANADIAN PACIFIC R.W. CO.

(*See* 10 *O.W.R.* 414.)

Negligence—Contributory negligence—Highway crossing—Findings of jury—Nonsuit—Sec. 224 *Railway Act*, 1903.

The defendants' railway ran east and west through the plaintiff's farm. The dwelling house was on a hill about 330 feet north of the railway track and standing about twenty feet from the highway leading to and across the railway track. There was nothing to obstruct the view in coming from the plaintiff's house to the crossing for a considerable distance on either side. The down grade of the highway is very slight for the last forty or fifty feet from the track.

The morning train coming from Elora, west of the plaintiff's farm, due to cross the highway three or four minutes before nine A.M., was eight minutes late on the morning in question.

The plaintiff before leaving his house that morning saw that it was ten or fifteen minutes after nine and concluded that the train must have passed without any one noticing it. In two or three minutes he heard a long whistle denoting a whistle for a station which he concluded was for Belwood Station, distant three miles to the north-east and therefore thought the train had passed over the highway at his farm. The whistle he heard however was to the south-west as there was no other train on the line and it passed across the highway a few minutes later. Shortly after this his son Byron, who intended going to a farm owned by the plaintiff across the railway track asked his father if the train had passed, who replied it must have passed, as it was nearly fifteen minutes past nine when he left the house. Byron then went into the house and left it with his brother James, a lad of twelve years old, to cross the railway track.

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A few minutes after Byron had left the plaintiff was standing near the barn, beside the house, when he heard the train rush eastward through the mist, but he heard no whistle or bell.

The morning was foggy and the plaintiff stated a person could not see an object at a greater distance than 37 yards.

After the accident the plaintiff was notified and at once went to the crossing where he found Byron on the eastern half of the highway about two feet from the north rail of the track. He was taken home and died shortly afterwards remaining perfectly conscious meanwhile.

According to the statement of the deceased, made to his father, he was some yards from the track when he heard the noise of the train and the steam from the engine as it passed, but was unable to stop and was struck by the step of the last coach.

A motion for a non-suit at the close of the plaintiff's case was refused and the jury brought in a verdict for $2,000 in favour of the plaintiff, finding the defendants guilty of negligence in not giving the statutory signals,—that the injury was caused by the defendants' negligence—and that the deceased was not guilty of negligence and could not by the exercise of reasonable care have avoided the accident.

The Divisional Court dismissed the defendants' appeal, holding that the case could not have been withdrawn from the jury. MacMahon, J., dissenting held that on the admission made by the deceased that he heard the train coming and did not stop or could not stop, there was nothing to be left to the jury and the motion for non-suit should have prevailed.

The Court of Appeal allowed the defendants' appeal and dismissed the action.

Per Osler, J. A., agreeing with MacMahon, J.—The deceased according to the evidence was the author of his own injury, the accident could only be attributed to his negligence, and not to the negligence of the defendants in omitting, if they did omit, to sound the bell or whistle.

Per Meredith, J.A.—The plaintiff should not have been non-suited but there was no reasonable evidence upon which the jury could find that there was not contributory negligence. The evidence shewed that the deceased was to have the farm on the father's death, in the meantime they were to be partners, and the son was to get what he needed out of the common fund, the plaintiff has proved no pecuniary loss and the action must fail on that ground also.

APPEAL to the Divisional Court from the judgment at the trial in favour of the plaintiff.

The action was tried at Guelph before Mulock, C.J., Ex. D., with a jury on 5th and 6th April, 1906. At the close of the evidence for the plaintiff the defendants moved for a nonsuit which was refused. The answers of the jury appear in the headnote with a statement of the facts taken from the judgment of MacMahon, J.

On 2nd of October, 1906, the appeal was heard before Meredith, C.J. C.P., Div., MacMahon and Teetzel, JJ.

Angus MacMurchy, for the defendants.

M. J. O'Reilly, for plaintiff.

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5th January, 1907. MEREDITH, C.J.C.P.:—I have had an opportunity of reading the opinion of my brother MacMahon. With his statement of the facts as developed at the trial I agree, but I am with great respect unable to come to the conclusion that the only inference that reasonably could be drawn by the jury was that the deceased's injury and subsequent death were not the proximate result of the negligence of which the appellant's servants were, according to the finding of the jury, guilty in passing over the highway crossing without giving the warning of the approach of the train, which under the provision of the Railway Act it was their duty to give.

The jury, having found that the prescribed statutory warning was not given, might well have reached the conclusion that the deceased was in effect told by the appellants that there was no train approaching which had reached a point nearer than eighty rods from the crossing, and that as the line was one upon which no other train than the passenger one, which caused the injury to the deceased, ran at or near the time when this train passed over the crossing, even if the deceased and his brother were running down the hill to the crossing at such a speed that when the deceased suddenly became aware that a train was crossing he was unable to stop in time to prevent coming into collision with the train, that was not a negligent act constituting contributory negligence on his part or one which severed the causal connection between the negligent act of the appellants' servants and the injury to the deceased.

It may be that this was the view taken by the jury as to the way in which the accident happened, and if it was I am unable to say that it was so unreasonable a view that their findings ought to be set aside.

It was no doubt open to the jury to have found that the injury to the deceased was not caused in the way suggested, but that he might have stopped before coming to the track had he chosen to do so, and that he knew that a train was passing over the crossing and was injured owing to his having attempted to

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cross over the track before the train had got over the crossing, misjudging on that hypothesis the length of the train. If that had been the fact as found or the only reasonable conclusion to be drawn from the testimony, there would be difficulty in the way of the respondent succeeding. But it must, I think, be assumed that the jury negatived this theory and adopted the other, with which I have dealt.

Though one might have been better satisfied if the findings of the jury had been the other way, I am unable to say that the findings they have made should be set aside, and the result is that in my opinion the judgment should be affirmed and the appeal dismissed with costs.

MACMAHON, J.:—The action which was tried at Guelph on the 4th April last, before the Chief Justice of the Exchequer Division and a jury was brought by Forbes Moir to recover damages for the death of his son, Forbes Byron Moir, caused, as it is alleged, by the negligence of the defendants in running one of their trains across a highway in the township of Garafraxa.

Forbes Byron Moir was eighteen years old at the time of his death, and had been working for his father on a farm in Garafraxa for the previous six years. The Canadian Pacific runs east and west through the plaintiff's farm, the dwelling house being on a hill about 330 feet north of the railway track, and standing about 20 feet from the concession line between the fourth and fifth concessions, which is the highway leading to and across the railway track. On each side of the highway there is a rail fence, and to the east on the north side of the railway track there is a wire fence, and to the west on the north side of the track there is a wire fence for a distance of 223 feet; so that in coming from the plaintiff's house to the crossing there is nothing to obstruct the view of the railway track for a considerable distanee on either side.

From the house to the track there is a down grade which becomes very slight 40 or 50 feet from the track.

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The plaintiff has been living on his farm for forty-six years, and trains have been running on the railway for twenty-seven years.

The morning train is due to leave Elora at 8.40 and runs north-east through Fergus, the next station being Spier's, a flag station, and the next station Belwood, three miles north-east of Spier's, and is due to cross the concession line between the 4th and 5th concessions, at the plaintiff's farm, which is between Fergus and Spier's station, three or four minutes before nine o'clock. It was, however, eight minutes late leaving Elora on the morning in question.

The plaintiff went out of his house that morning, but before doing so looked at the clock and saw it was between 10 and 15 minutes after nine, and he concluded the train must have passed without anyone noticing it. In two or three minutes he heard a long whistle, denoting a whistle for a station, and, from the direction he thought the sound came from, concluded it was for Belwood station, distant three miles to the north-east. and therefore thought the train had passed over the concession line at his farm. The whistle he heard, however, was to the south-west, as there was no other train on the line and it passed across the concession line going east a few minutes after. Shortly after this his son, Byron, who intended going to a farm owned by plaintiff across the railway track, asked his father if the train had passed, who replied that it must have passed as it was nearly 15 minutes past nine when he left the house. Byron then went into the house and left it with his brother, James, a lad twelve years old, to cross the railway track. A few minutes after Byron had left, the plaintiff was standing near the barn when he heard the train rush easward through the mist, but he heard no whistle or bell. The whistling post is eighty rods west of the crossing, and the whistle for the crossing, he said, is four sharp blasts. According to the plaintiff's evidence the morning was foggy, and he stated a person could not see an object at a greater distance than thirty-seven yards. The conductor of the train (W. D. German), said it was a dark, dismal day, but coming to Belwood station he

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could see the village, distant a quarter of a mile, and W. J. Miller, the brakeman, said it wasn't so very misty, it was next thing to a drizzly rain.

After the accident the son, James, returned to the house and the plaintiff was notified and at once went to the crossing, where he found Byron on the eastern half of the highway about two feet from the north rail of the track. He was taken home and remained perfectly conscious until just before his death on the 28th December.

The plaintiff wrote out a statement with a little plan attached thereto, which he appears to have sent to the railway company, which was put in by counsel for the defendants at the trial, and is as follows:—

"Statement of the father of Forbes Byron Moir as to the facts regarding his son's accident which happened on the C.P.R. crossing on line between 4th and 5th concession, West Garafraxa.

"On the morning of the 26th December, which was very misty, deceased had got through with feeding the stock at barn marked "A" and started to go to barn marked "B" calling in at the house by the way and looking at the clock saw that the time was about fifteen minutes after nine. Seeing that was the time he was sure in his own mind the train due to leave Elora at 8.40 a.m. was past and the crossing in a safe as we always expect it at 9 exactly. He then heard a whistle which sounded to him as being near Belwood which fully convinced him that the train was past (the whistle had sounded for the third line crossing and Spier's station). When within some yards of the track he heard the noise of the train but saw nothing and was unable to stop. He was quite sure it was the step of the last coach though he saw nothing, the east wind blowing the steam to his side, and the mist combined making thick darkness. He was knocked some 10 feet to north-east and found by his brother who was some distance behind him. He never lost consciousness. The whistle was not blown at point to signal that crossing nor the bell rung. His age was 18 years and 7 months."

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The deceased told Dr. Burr that "he and his younger brother were trotting down the hill to the other farm, that it was a very misty morning and that the smoke blew back on that side of the train and with the smoke and the mist behind he could not see the train and ran into it and got struck by it."

According to the statement of the deceased made to his father, he was some yards from the track when he heard the noise of the train and the steam from the engine as it passed, but was unable to stop, and was struck by the step of the last coach. The reason of his inability to stop was not stated, but as according to his statement to Dr. Burr, he was trotting down the hill, there is no assignable reason why he should not have stopped when he heard the noise of the train, for he was some yards away.

The train consisted of the engine and tender, a baggage car and two passenger coaches.

The deceased said he was struck by the step of the last coach, and it was found when the train reached Belwood or Orton station, either three or eight miles from where the accident happened, that it was the rear step of the last coach which must have struck deceased, as a piece of the step had been split off. The blow must have been made with considerable force, as he was knocked 10 feet east on the highway; and the engine and tender, the baggage car and first passenger coach must have passed over the crossing before he was struck.

The following are the questions submitted to the jury with their answers thereto:—

"1. Were the defendants guilty of negligence? A. Yes.

"2. If so, in what did the negligence consist? A. By not giving proper warning, the blowing of the whistle eighty rods distant from the crossing of the public highway and the continuous ringing of the bell until the engine had crossed the highway where the accident occurred.

"3. If the defendants were negligent, was the injury to the deceased caused by their negligence? A. Yes.

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"4. Was the deceased guilty of negligence? A. No.

"5. If so, in what did the negligence consist?

"6. Could the deceased by the exercise of reasonable care have avoided the accident? A. No, according to the evidence submitted.

"7. At what sum do you assess the plaintiff's damages? A. Two thousand dollars ($2,000)."

The Railway Act, section 224, requires the bell to be rung "at least eighty rods before reaching the crossing and to be rung continuously until the engine has crossed such highway." This statutory duty the jury found had not been complied with by the defendants. But the engine and greater part of the train had passed over the highway before the deceased had reached the track, and the injury to him was not caused by a breach of the statutory duty to ring the bell, as the train did not run into him, but he ran into the rear end of the train, because, according to his own admission, he could not stop although some yards away. Had he been able to stop, the accident would not have happened. His neglect or inability to stop was not the fault of the railway company but his own misfortune, for which the company cannot be held liable.

Although the deceased was trotting down the hill he should on nearing the crossing have been able to stop, or at least moderate his speed, for he not only heard the train approaching but saw the steam from the engine as it passed and was some yards away.

On the admission made by the deceased that he heard the train coming and did not stop or could not stop, and as a consequence ran into the train, there was nothing to leave to the jury, and the motion for a nonsuit should have prevailed.

I would direct that the verdict and judgment be set aside and that judgment be entered for the defendants with costs.

TEETZEL, J.:—The jury having found upon abundantly sufficient evidence that the defendants did not discharge their statutory duty by sounding the whistle and ringing the bell, the

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only question is whether, notwithstanding their finding that the deceased was not himself guilty of negligence, it is clearly manifest that his own acts were the cause of the injuries which led to his death; in other words, was there upon the evidence no fact or inference of fact to be left to the jury to decide upon the question of the deceased's negligence.

I think upon the undisputed facts the deceased ran into the train and was struck by the hind step of the rear car; but the plaintiff urges that the existing circumstances removed from the deceased the charge of negligence in doing so.

The circumstances relied on are, the absence of warning, his belief that the train had actually passed the crossing a few minutes before, that in the ordinary use of the railway at this point no other train was to be expected at that hour, and the foggy condition of the atmosphere.

It was for the jury to say whether the reasons given for not seeing the train in time to prevent the accident were sufficient, and whether under all the circumstances the deceased exercised reasonable care.

I think in view of the circumstances alluded to, the learned trial Judge could not have properly withdrawn the case from the jury, and that their findings after a charge not objected to should not be disturbed. I agree, therefore, that the appeal should be dismissed with costs.

The defendants appealed to the Court of Appeal. The appeal was heard on 3rd and 6th May, 1907, by Moss, C.J.O., Osler, Meredith, Garrow and Maclaren, JJ.A.

G. T. Blackstock, K.C., and *Angus MacMurchy*, for the appellants.

O'Reilly, for the respondent.

June 28, 1907. OSLER, J.A.:—Having given this case the best consideration in my power I find myself in agreement rather with the result arrived at by my learned brother MacMahon than with the opinions which prevailed in the Divisional Court. It

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appeared from deceased's own account of the occurrence—and there was no ground for the jury adopting or setting up any conjecture opposed to it—that he heard the noise of train and knew that it was passing or approaching the crossing, though from the heavy mist which prevailed and the steam or smoke blowing over it on his side he was unable to see it. The evidence discloses to my mind as plain a case as can be put of his running into the train and thus being the author of his own injury. The real explanation of his conduct probably is that he supposed that the train was of the same length as the train which usually passed the crossing at that hour of the morning and that the mist and smoke prevented him from seeing that there was an additional car into or against which he ran thinking that he was passing behind the whole train. The accident can therefore only be attributed to the negligence of the unfortunate deceased himself and not to the negligence of the defendants in omitting, if they did omit, to sound the bell or whistle. In my opinion the action fails and the appeal must be allowed and the action dismissed with costs throughout if the defendants demand them.

MEREDITH, J.A.:—As I view the case there are now just three questions involved in it, namely: (1) Whether there is any reasonable evidence to support the finding of the jury that the neglect to ring the bell and sound the whistle was the cause of the accident; (2) whether there was any such evidence to support their finding that the injured youth was not guilty of contributory negligence; and (3) whether there was any such evidence of any pecuniary loss to the plaintiff.

It may be, and must be, very difficult for many persons to think that one who did not hear the sound of a swift passing train, within a few feet of him, on a still morning, with no other sounds interfering, would have heard the sound of the whistle at least eighty rods away, or the ringing of the bell whilst swiftly passing that distance. The roar of a train under such circumstances is, as everyone knows, so great that it is extremely difficult, if not quite impossible, to believe that anyone having the

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sense of hearing, and exercising it with a view to self-preservation at a railway crossing, could fail to hear it. But one's mind may be so abstracted as to fail to observe it, and yet the shrill sound of the whistle, or even the sound of the bell, might possibly awaken such a mind to a sense of danger from the on-coming train. It cannot, therefore, be said that the case ought not to have gone to the jury at all, that the plaintiff ought to have been nonsuited on this ground.

But I cannot think there was any sort of reasonable evidence upon which the jury could find that there was not contributory negligence. A youth—nineteen years of age—in possession of all his faculties, ran into a passing train in the daytime and was almost necessarily seriously wounded. The one circumstance in his favour is that it was a misty morning, but not so misty as to prevent the plaintiff from seeing the train pass, although he was about seventy-five yards away from it. The density of the mist is made doubly plain by his noticing that an object—apparently such an object as a telegraph pole—could be distinguished at the distance of about half of 75 yards. The mist was no excuse for not seeing, or hearing, the train when very much nearer than 75 yards, or one-half of 75 yards, only, away from it. Indeed it was a reason for approaching the crossing with more care, depending the more upon hearing, when sight was thus dimmed. The train was a little later than usual, and the youth was apparently under a mistaken impression that it must have passed. But his mistake was no excuse for any recklessness or of want of ordinary care, nor was the fact that on this morning of a holiday the train was a little later in passing this spot than usual. However the youth's action is looked at and accounted for, there is no escape from the fact that by the exercise of ordinary care in going into this place of danger, he might have avoided his injury. It cannot be contended that he is not bound to take any care, and it seems like a parody of prudence to say that it was enough to enquire the time of day and to be informed by his father that he thought the train must have

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passed, and to have imagined that he heard the whistle of a train which had passed. What need of all or any of these things if he kept his ears open when approaching the crossing? It is not as if he were even driving, and there were the sounds of the moving horses and vehicle, as well as the need for his mind being in some degree taken up in the management of them. Upon this question, in my opinion, the action failed, and should have been dismissed.

And I am of opinion that it failed on the third question also. The plaintiff can recover only for pecuniary loss. The action should have been dismissed if none were proved. It is not a case in which nominal damages may be awarded when no actual loss is proved. And the plaintiff's evidence not only failed to prove any pecuniary loss, but shewed that none such had been, or shall be sustained by him. His story is not merely that his son had been working for him and was a capable farmer, but was that there was a clearly understood agreement between them that, the son was to have the 200 acre farm at the father's death, and that in the meantime they were to be partners, and that the son was to get what he needed out of the common fund. Such a bargain made with a stranger would surely be much in favour of the stranger. It would be a very easy thing to get full grown and experienced farmers to enter into such a bargain; so that, looked at purely from a money point of view, on the plaintiff's own shewing, he has sustained no loss; he can doubtless make much better terms with more competent men; but, of course, he would not make the like terms with them; it was only because it was his own son that he gave him such an advantage.

On these two grounds I would allow the appeal and dismiss the action.

Per CURIAM.—Appeal allowed and action dismissed with costs.

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HIGHWAY CROSSING—NEGLIGENCE—NONSUIT.

ONTARIO.] [MULOCK, C.J.
[COURT OF APPEAL.

HANNA v. CANADIAN PACIFIC R.W. CO.

(*See* 11 *O.W.R.* 1069.)

Negligence—Contributory negligence—Highway crossing—Findings of jury—Nonsuit—Sec. 274 *Railway Act, R.S.C. ch.* 37.

In an action to recover damages for the death of a man who was struck by a train of the defendants at a highway crossing where the evidence for the plaintiff shewed at most a total absence of warning, but there was not at the close of the whole case, any evidence upon which the jury, acting reasonably, could find that the absence of warnings caused, or in the slightest degree contributed to the accident, which the undisputed evidence shewed was wholly due to the reckless conduct of the deceased in attempting to cross after he became fully aware of the approaching train.

Held, reversing the judgment at the trial, that the case should not have been submitted to the jury but the action should have been dismissed.

In such cases, the facts, if in dispute, must be found by the jury, but the Judge must first rule as a matter of law whether there is any evidence from which the inference necessary to support the plaintiff's case can reasonably be drawn, if there is no such evidence, the plaintiff's case fails.

The statutory signals required to be given by sec. 274 of the Railway Act, R.S.C., ch. 37, are intended to warn persons likely to be in danger. If not given there is a presumption of safety upon which a reasonable person may act, and if, while so acting he is injured the company may be liable, but he can not, because no warning had been given, proceed to cross in front of an advancing engine which he sees or hears and then blame the absence of warnings for his injury.

APPEAL by the defendants from the judgment of Mulock, C.J. Ex.D., from the verdict of the jury in favour of the plaintiff for $4,500.

The accident happened at the crossing of Ellis avenue by the tracks of the Grand Trunk Railway immediately west of the westerly limit of the City of Toronto, in the vicinity of High Park, Grenadier Pond lying between Ellis avenue on the west and High Park on the east.

The defendants have running rights over the section of the Grand Trunk Railway between Toronto and Hamilton.

The next street west of Ellis avenue is Windermere avenue, a distance of about three hundred yards and west of Windermere avenue the river Humber enters Lake Ontario.

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The questions put to the jury with their answers are as follows:—

1. Were the defendants guilty of any negligence which caused the accident? A. Yes.

2. If so, wherein did such negligence consist? A. The bell did not ring and the whistle did not blow according to the requirements of the statute.

3. Was the deceased guilty of any negligence which caused or contributed to the accident? A. No.

4. If the plaintiff is entitled to succeed, at what sum do you assess the damages? A. $4,500: to the widow, $500; to the infant son, $2,000 to the infant daughter, $2,000.

The other facts appear in the judgment.

G. T. Blackstock, K.C., and *Angus MacMurchy*, for the appellants.

J. M. Godfrey and *T. N. Phelan*, for the respondents.

The appeal was heard before Moss, C.J.O., Osler, Garrow and Maclaren, JJ.A., on 29 January, 1908.

For the appellants it was argued that the evidence of the appellants' witnesses is uncontradicted that the deceased not only made no effort to avoid a collision with the engine on the crossing, but actually attempted to cross in front of the engine, and was guilty of such contributory negligence as disentitled the respondent of all right to recover damages from the appellants.

The findings of the jury upon the evidence are perverse and against evidence and the weight of evidence, and are such that no twelve reasonable men could have possibly found.

The learned trial Judge erred in asking the witness, Flood, the engineer of the train concerned in the accident, to mark on the map, which he evidently did not understand, and as to which the learned Judge refused any explanation to be made by counsel for the appellants, the places where he (Flood) sounded the whistle previous to reaching Ellis avenue. The distances of these marks from the scene of the accident were subsequently mea-

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sured by the witness Hall, a civil engineer, under the direction of the learned trial Judge, and on these measurements the learned Judge based his charge to the jury relative to the alleged negligence of the appellants in not sounding the whistle at the proper distance as required by statute. They cited the following cases:—.

Hainer v. *Grand Trunk R.W. Co.*, 36 S.C.R. 180, 5 Can. Ry. Cas. 59.

Moir v. *Canadian Pacific R.W. Co.*, 10 O.W.R. 414 and *supra*.

Slattery v. *Dublin, Wicklow & Wexford R.W. Co.*, 3 App. Cas. 1155, at pp. 1166 and 1195.

Skelton v. *London & North Western R.W. Co.*, L.R. 2 C.P. 631, at p. 636.

Ellis v. *Great Western R.W. Co.*, L.R. 9 C.P. 551, at pp. 556-7.

Stubley v. *London & North Western R.W. Co.*, L.R. 1 Ex. 12.

Coyle v. *Great Northern R.W. Co.*, L.R. 20 Ir. 409, at p. 415.

Railroad Co. v. *Houston*, 95 U.S.R. 697, at p. 701.

Elliott v. *Chicago, Milwaukee & St. Paul R.W. Co.*, 150 U.S.R. 245, at p. 248.

For the respondents it was argued that the question in this appeal is whether there is any evidence to support the findings of the jury that the death of the plaintiff's husband was caused by the defendants in failing to give the warning required by statute, of the approach of the train to Ellis avenue, where the accident occurred.

The witnesses for the plaintiff testified that no warning by whistle or bell of the approach of the train was given as required by statute.

This is not a case of the jury finding upon negative evidence as to the failure to give the signals, but the defendants' own witnesses shewed conclusively that even if the signals were given they were not given at a place about eighty rods from the crossing, as required by the statute or in such a way as to give any or sufficient warning to the deceased.

The verdict of the jury should not be disturbed in appeal.

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A verdict ought not to be disturbed as against the evidence or weight of evidence, unless it is one which a jury viewing the whole of the evidence reasonably could not properly find. *Phillips* v. *Martin*, 15 App. Cas. 193; *Coghlan* v. *Cumberland* (1898), 1 Ch. 704; *Fraser* v. *Drew*, 30 S.C.R. 241; *In re Christie and Toronto Junction*, 22 A.R. 21, at page 22.

April 21, 1908. GARROW, J.A.:—Appeal by the defendants from the judgment at the trial, before Mulock, C.J., and a jury.

The action was brought by the plaintiff, suing for herself and her two infant children, under the provisions of R.S.O. 1897, ch. 166, to recover damages for the alleged negligence of the defendants in the operation of their railway, whereby her husband, Horatio Wraxel, lost his life in crossing the defendants' tracks at Ellis avenue, in the township of York, near the city of Toronto.

The accident occurred a few minutes before six o'clock in the evening of the 2nd day of October, 1906. Wraxel had come south on Ellis avenue, intending to reach the Lake Shore Road on his way into the city. He was accompanied by his step-daughter, Carrie Cotterill, and by a friend called Tremblett and Tremblett's little girl. There were four tracks. The two most southerly were used for traffic, and the others were sidings. On the most northerly of the latter there were some cars standing which obscured the view to the west until they were passed, but from the second track the line of the tracks westerly was straight and in sight for 1,500 feet, or considerably beyond Windermere avenue. On reaching the north side of the tracks the party stood for about five minutes, according to the evidence of Miss Cotterill. Then she and the little girl crossed in safety. She thought Wraxel and Tremblett were following immediately behind, but they had remained on the north side talking, until suddenly Wraxel left Tremblett and hurried across the track after his step-daughter, and was struck by an engine attached to an express train proceeding easterly on the third track from the north, and was instantly killed. The train was running on time, and at its

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usual speed of about fifty miles an hour. Tremblett is said by the plaintiff to be in California. At all events he was not called as a witness.

The negligence complained of was in not having a signal man at the crossing, in not having gates, a failure to give the statutory warnings by blowing the whistle and sounding the bell, and by proceeding at a greater speed than ten miles an hour.

The only evidence on behalf of the plaintiff as to the occurrence itself, and the absence of the statutory warnings, was that of Miss Cotterill, and as to the latter what she said was, "The train had took him, and I heard no whistle, and heard no bell ring." Q. "If a bell or a whistle had rung, could you have heard it?" A. "Yes, sir, we always heard it other times."

What was to be inferred from this evidence was, as pointed out by Fitzpatrick, C.J., in *Wabash R.W. Co.* v. *Misener*, 38 S.C.R. 94, at page 97, 6 Can. Ry. Cas. 70, that the engineer and fireman had neglected their statutory duty and rendered themselves liable to a criminal prosecution, in addition to making the defendants liable in damages, and if the learned Chief Justice had granted the defendants' motion for a nonsuit, upon the ground that the evidence was insufficient to reasonably justify such an inference, the plaintiff would, I think, have had some trouble in setting it aside. However, the motion was refused, and the defendants called a number of witnesses, and the jury in answer to questions found: (1) that the defendants were negligent; (2) in a failure to ring the bell and blow the whistle according to the requirements of the statute; (3) the deceased was not guilty of contributory negligence; and (4) they assessed the damages at $4,500—$500 to the widow and $2,000 each to the two infant children.

The defendants appeal, and contend that there was no evidence proper for the jury of the acts of negligence complained of; the injury was solely due to the negligence of the deceased;

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the findings of the jury were against the weight of evidence and the damages awarded are excessive.

It was a necessary part of the plaintiff's case to prove by reasonable evidence the absence of the statutory warnings, for, although other acts of negligence are mentioned in the statement of claim, the only ground finally relied upon was the absence of the warnings. And, of course, the plaintiff might eke out her exceedingly slender case by the evidence given on behalf of the defendants. At the close of the plaintiff's case, the case (if any) made out was a total absence of warnings. The only witness, Miss Cotterill, heard neither whistle nor bell. But Flood, the engineer, and Clark, the fireman, both swore that both warnings were duly given, in which they were to some extent corroborated by the other witnesses called for the defence, and at the end the real conflict was as to whether they had been given at the right place, *i.e.*, the whistle at least 80 rods west from Ellis avenue, and the bell continuously rung thereafter. And any doubt as to the place apparently arose from the attempt of Flood, the engineer, at the request of the learned Chief Justice, to mark upon the plan exactly where he had whistled. He made two marks—one it is said 157 rods west from Ellis avenue and the other just at Windermere avenue or about 55 rods west. The speed was almost a mile a minute, and the feat of marking, under the circumstances, exactly where he had whistled, was certainly not an easy one. And, in my opinion, quite too much was made of it, because the other evidence shews that there was whistling to the west of the mark, at Windermere avenue, and to the east to the other mark. Dore, the Grand Trunk agent at Swansea station, which is at Windermere avenue, heard the train coming and heard the whistle sound about 100 yards west of that avenue. If it had been 140 yards, that would give the requisite 80 rods, and his guess, however honest, might easily have erred to the extent of 120 feet.

Alfred Presley, the watchman, was standing on Windermere avenue when the train passed. He heard it coming, and saw it

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pass, and also heard "the whistle away up before she came to the crossing long enough. . . . I could hear her away up some place . . . the bell was going, and she whistled right at Windermere crossing." Garfield Hood, walking near the foot of Ellis avenue, heard the whistle "west awhile" of Windermere avenue. Frank Leake, standing at the stable door opposite the Grenadier Ice warehouse, east of Ellis avenue, a short distance, heard the whistle "three or four times anyway" before the train crossed Ellis avenue, none of which occurred between the station at Windermere avenue and Ellis avenue, or after the train came within his vision. Presley is the only witness who speaks of having heard the bell, in this respect clearly corroborating the fireman's testimony that it rang from the Humber easterly until the accident. And Presley's positive testimony as to the bell is, of course, of much more value than that of the other witnesses who say they did not hear it, but none of whom say it did not ring. Under these circumstances, the finding of the jury that the statutory signals were not given seems to largely rest on the possibly erroneous marks made by the engineer, under circumstances which apparently excluded explanation.

But, even upon the assumption that the warnings were not duly given, the plaintiff's difficulties are not over. She must still connect the negligence as a cause with the accident. The signals by whistle and bell are intended to warn persons likely to be in danger, and, if not given, there is a presumption of safety upon which a reasonable person may act, and if, while so acting, he is injured, the company may be liable. But he could not, because no warnings had been given, proceed to cross in front of an advancing engine which he sees or hears, and then blame the absence of the warnings for his injury. And that, upon the whole evidence, seems very much to resemble what this unfortunate man did.

The track is straight for 500 yards west of Ellis avenue. It was daylight, and the deceased knew the crossing. The tracks are about 50 feet across, and to the middle of the third track is

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about 35 feet. Tremblett made no attempt to cross, in itself a suggestive circumstance, for both men were together and in an equally good position to see and hear. What actually occurred is told by several witnesses called for the defence. Joseph Mulligan said he was walking with his friend Medland at the south of the tracks, going easterly on the Lake Shore road, between Windermere avenue and Ellis avenue, and was close to Ellis avenue when he heard the whistle. He saw two men talking on the north side of the tracks. "Q. Then what did they do? A. The man seemed to glance up to track after the whistle blew, and ran. He left his friend and ran straight across. . . . Q. Then did you notice whether this man that was struck looked west for the train? A. I fancy he glanced all right. I could not swear to it. Q. But it was after the whistle blew that he started to run across? A. Yes. Q. And his friend who was with him stayed back? A. Stayed back. Q. And escaped? A. And escaped."

Medland, who was with Mulligan, said the deceased made a "dash," as he called it, and Clark, the fireman, saw him on the second track "running" south, in front of the engine, having a moment before seen the two men standing on the north track.

Wilson thus described what he saw: "A. Well, he seemed to walk out to this third track and then looked to hesitate to me as if to go back, and then the train came into view, and I could not see the rest." Wilson also heard the whistle beyond Windermere avenue, and again between Windermere avenue and Ellis avenue.

Garfield Hood, who was with Wilson, did not hear the whistle after Windermere avenue, nor did he see deceased hesitate as described by Wilson, but he saw him crossing and also apparently looking in the direction of the train.

There are, of course, the usual discrepancies met with between honest witnesses, but out of the whole it is not difficult to reconstruct the exact situation. Two witnesses thus speak of haste on his part—one that he ran, the other that he made a dash, but, even if his gait was only that of a walk, he had only

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gone about 35 feet when he was struck. To do that distance would only take about two seconds at a walk, while it would take about twelve seconds for the train at its speed to come from Windermere avenue to Ellis avenue, which shews that, when he started, the train was already well to the east of Windermere avenue. About the loud whistling at Windermere avenue there can be no dispute, and there is no room seriously to doubt both Wraxel and Tremblett heard it, as the others called by the defence did. Nor can there be any doubt that they both saw the train when past Windermere avenue. They could not help but see it if they looked, and the undisputed evidence is that at least Wraxel looked after the whistle at Windermere avenue and before he started across. If he had remained where he was, as Tremblett did, he was perfectly safe.

One of the difficulties in such cases as this is to properly respect the line between the function of the Judge and of the jury. The facts if in dispute must, of course, be found by the jury, but the Judge must first rule, as a matter of law, whether there is any evidence from which the inference necessary to support the plaintiff's case can reasonably be drawn, for, if there is no such evidence, the plaintiff's case fails.

And, whatever may be said about the absence of the statutory warnings, it seems to me to be beyond question that the plaintiff quite failed to connect their absence with what followed—that, in other words, there was not at the close of the case any evidence upon which the jury acting reasonably could find that the absence of the warnings caused or in the slightest degree contributed to the accident, which the undisputed evidence shews was wholly due to the reckless conduct of the deceased in attempting to cross after he became fully aware of the approaching train.

The appeal should, I think, be allowed and the action dismissed with costs, if asked.

Per CURIAM.—Appeal allowed and action dismissed with costs.

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HIGHWAY—BACKING TRAIN—SIGNALS.

ONTARIO.] [MEREDITH, C.J.C.P.

LAMOND v. GRAND TRUNK R.W. Co.

(16 *O.L.R.* 365.)

Railways—Accident to Employee—Watchman at Crossing—Backing Train—Negligence—Liability—Railway Act—R.S.C. 1906, *ch.* 37, *sec.* 276.

A watchman of the defendant company at a certain crossing in a city was killed by two cars being "kicked off" in the usual way from a train which was backing in an easterly direction for that purpose. A brakeman with a lamp was on top of the western-most of the two cars, but was not keeping a look-out, and gave no warning that the cars were moving. There was no light on the crossing, nor was any one stationed on the cars "kicked off," to warn people, and the engine bell was ringing:—

Held, that the defendants were guilty of negligence and were liable for his death, not having complied with sec. 276 of the Railway Act, R.S.C. 1906, ch. 37, by stationing a person on the front car to warn people.

Although the deceased was an employee of the defendants and it was his duty to protect persons crossing the track from the cars, he had a right to rely, so far as his own safety was concerned, on nothing being done to expose him to unnecessary danger, and on the above section being complied with.

Canadian Pacific R.W. Co. v. *Boisseau* (1902), 32 S.C.R. 424, followed.

THIS was an action for negligence, under Lord Campbell's Act, brought under the circumstances set out in the judgment. The action was tried before MEREDITH, C.J.C.P., sitting without a jury, at London, on January 7th, 1908.

G. C. Gibbons, K.C., and *G. S. Gibbons*, for the plaintiff.

W. Nesbitt, K.C., and *H. C. Pope*, for the defendants.

February 20, 1908. MEREDITH, C.J.:—The plaintiff sues under the provisions of R.S.O. 1897, ch. 166, to recover damages for the death of her husband, who was killed on the night of October 14th, 1907, owing, as she alleges, to the negligence of the defendants, and the action is brought for the benefit of the plaintiff and four children of the deceased.

The deceased was a watchman in the employment of the defendants, at the Colborne street crossing of their railway, in the city of London.

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According to the testimony of John Farmer, a brakeman in the defendants' service, he last saw the deceased alive a few minutes before his dead body was discovered lying between the rails of a track called the Old Port, and five or six feet from the west side of Colborne street. When seen alive by Farmer, which was when the second shunt, to be afterwards mentioned, was being made, the deceased was on the sidewalk on the east side of Colborne street, between Taylor's and Walker's tracks, carrying his lamp.

On this night, which was said not to be very dark, a train crew was engaged in making up a train. John Thompson was the yard foreman, whose duty it was to "line up the switches," which I understand to mean to put them in position for the operation of making up the train. It was also his duty to see that the watchman was at his place on the crossing. The train came from the old Grand Trunk yard, and was then backed eastward, in order to put two cars on the old Port track, west of Colborne street; it was then pulled across Colborne street eastward till the engine, which was at the head of it, was beyond Burwell street, the next intersecting street east of Colborne street; two cars were then backed on to the old Grand Trunk track; after this was done, the train went eastward on that track about 100 feet east of Colborne street; two cars were then kicked off, and ran across Colborne street; the brakeman was on the top of the westerly car, standing about twelve feet from the east end of it; he had a lamp in his hand, and glanced westward, not looking, as he said, for anyone, thinking, as he also said, that it was not his business to look when there was a watchman on the crossing; he made no signal and gave no warning that the cars were in motion, but was on the car apparently for the sole purpose of stopping the cars by the application of the brake when they had gone the distance they were intended to go west of Colborne street; there was no light on the crossing, but there was one on Bathurst street and another on York street, each distant from 150 to 175 feet from the tracks crossing Colborne street; there was no one stationed on either of the cars that were being kicked off, to warn

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persons, and the engine bell was ringing. When the deceased was found, his head was severed from his body, which had evidently been run over by a car.

It appeared in evidence, also, that a watchman has the right to stop a train; that the space between the tracks was wide enough for the deceased to stand in without danger; that the practice of "kicking off" was a usual one; that the deceased had been a watchman for twenty years; and that sometimes a whistle was sounded to warn the watchman.

It also appeared that the signal that a train is backing is three whistles of the engine, but that it was not usual to give that signal when shunting was going on.

It was also shewn that in discharging his duty the deceased would, from time to time, be called on to cross and re-cross the eight tracks which crossed Colborne street at the point where he was stationed.

It was argued by Mr. Nesbitt that it was impossible, upon the evidence, to determine how the deceased was killed; that it was equally, if not more, consistent with the evidence that he met his death when attempting to cross the tracks in front of the moving cars, having knowledge that they were moving, as that he was surprised by the moving cars and knocked down and run over by them, not being aware that they were moving towards him, and, in support of this contention, reliance was placed upon the position in which his body and his lamp were found.

I am unable to agree with this contention, and am of opinion that I may properly draw the inference that the deceased was knocked down and run over by the two cars which were being kicked across Colborne street in the manner I have detailed, and that the deceased was not aware of the approach of the moving cars.

What I am about to say upon the question of negligence, which is the next question to be considered, also bears upon the question I have dealt with.

The defendants were, I think, guilty of negligence. It was their duty not to subject the deceased, while in the discharge

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of his duty, to unnecessary danger, and that duty they, in my opinion, failed to discharge.

Although, according to the testimony, there was at the time no other train in movement at the Colborne street crossing except the one I have referred to, and the deceased knew that it was being made up, and although it was his duty to protect from danger from the moving cars persons crossing the tracks, he had a right to rely, as far as his own safety was concerned, upon nothing being done to expose him to unnecessary danger. His duties were not confined to a fixed spot, but he had to cross and recross the tracks, and to be on the look-out for persons intending to cross them, in order to protect them from danger from the train or the cars when being moved across the street. The method adopted in shunting the cars, notwithstanding the encomiums bestowed upon it, was, in my view, a dangerous one, and calculated to expose the deceased to unnecessary danger, when it is borne in mind that at the time of the accident the train was headed eastward and 100 feet east of Colborne street, and that the bell was ringing, which, if it indicated anything, indicated that the train was moving eastward. It appears to me that it was a highly dangerous and quite unnecessary thing that the train should be moved backward, so as to push the two cars which were being kicked off across and beyond Colborne street, without any warning whatever as to what was being done. Surely it is not requiring too much of the defendants that, where such an operation is going on, some care at least should be taken to warn those who might be put in danger, of it. The brakeman who stood on top of the westerly car was not in a position to warn anyone, even if he had deemed it his duty to be on the look-out, and why was not the backing signal of three whistles given, or why was not someone stationed on the top of the cars to give warning, or why—and that would have been still better—did not someone walk ahead of the moving cars with a light to give warning of their approach? That appears to have been the course adopted by the yard foreman when lining up the switches, and to have been done by the brakeman in kicking another car across Colborne

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street after the deceased had been killed. The brakeman said, it is true, that it was his practice to do this only when a coupling was to be made, but I see no reason why it should not be done even where no coupling was to be made.

I find, therefore, that the defendants were negligent in backing the cars across Colborne street in the manner in which that operation was conducted, and that their negligence consisted in failing to give warning of the movement of the cars, especially when the indications from the engine seemed to point to something being done that was not likely to go on while a kicking operation was taking place.

I am unable to find that the deceased was guilty of contributory negligence. Assuming that when he was knocked down he was standing between the rails, which I do not find, that would not, in the circumstances I have detailed, necessarily disentitle him to recover.

Mr. Gibbons, besides relying upon the common law duty of the defendants, contended that sec. 276 of the Railway Act, R.S.C. 1906, ch. 37, was applicable, and that, as the defendants had not complied with the requirement of the section by stationing on the westerly of the two cars a person who, in the language of the section, "shall warn persons standing on or crossing or about to cross the track of such railway," the plaintiff was entitled to recover.

Mr. Nesbitt argued the contrary, contending that the section has no application to employees of a railway, and in support of his contention cited *Wallman* v. *Canadian Pacific R.W. Co.* (1906), 6 Can. Ry. Cas. 229, where Mathers, J., expressed doubt as to the applicability of the section to others than the travelling public.

I am unable to find any reason for so restricting the enactment. Its language is wide enough to embrace employees of the railway company while standing on or crossing or about to cross the tracks of the railway. It may be that the primary object Parliament had in mind to accomplish was the safety of the travelling public, but I see no reason why an employee of a

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railway company should be excluded from the benefit of the protection which the statute was intended to secure to persons on the track or about to cross it, even though only in the discharge of their duty as employees.

Canadian Pacific R.W. Co. v. *Boisseau* (1902), 32 S.C.R. 424, was cited by Mr. Gibbons as having determined this question in accordance with his contention.

Section 260—the section then in force—is not referred to in the reported judgment of the Supreme Court, but it appears from the report of the case in the Court below, (1902), 11 Q.O.R. 394, that it was relied on by the plaintiff.

The husband of the plaintiff was a conductor in the employment of the defendants, and was struck by a train moving backwards in the yard of the Windsor station of the defendants, and instantly killed, and the absence of a light or a man on the rear of the train to warn persons standing on or crossing the track of the railway was relied on to support the plaintiff's claim. The trial Judge (Langelier, J.) held the section to be applicable, and, on appeal to the Court of King's Bench, Ouimet, J., was of the same opinion, and the Chief Justice (Lacoste) was of opinion that sec. 260 is applicable to movements of a train at a station where the public is admitted, and stated that he meant by station all the space occupied by the platforms where the passengers embark or disembark, and where the public has access, and not merely the building called the shed (*la remise*).

In delivering the judgment of the Supreme Court, the Chief Justice said:—

"I adopt in its entirety the opinion expressed in the Court below by Chief Justice Lacoste."

Unless, therefore, the section as amended by the Act of 1903, and as it appears in the Revised Statutes as sec. 276, has been so altered as to require that a different construction be put upon it, the *Boisseau* case governs, and sustains the position taken by Mr. Gibbons.

Section 260 reads as follows:—

"Whenever any train of cars is moving reversely in any city,

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town or village, the locomotive and tender being in the rear of such train, the company shall station on the last car in the train a person who shall warn persons standing on or crossing the track of such railway of the approach of such engine, tender and train, and for every violation . . ."

Section 276 of the Revised Statute reads as follows:—

"Whenever in any city, town or village, any train is passing over or along a highway at rail level, and is not headed by an engine moving forward in the ordinary manner, the company shall station on that part of the train, or of the tender, if that is in front, which is then proceeding foremost, a person who shall warn persons standing on, or crossing, or about to cross the track of such railway."

The only change effected by the amendment is that the duty which the section casts upon the company now rests upon it only when a train is passing over or along a highway at rail level, while by sec. 260 the duty was imposed whenever the train is moving reversely, without any expressed limitation as to place, except that of its being within a city, town or village.

If under the earlier legislation the duty was owed to an employee of the company while engaged in the performance of his duty at a station where passengers embark or disembark and where the public have access, there is no reason, I think, why, notwithstanding the change in the section, the duty imposed by it is not owed to an employee while engaged in the performance of his duty, and who is injured by a train crossing a highway, where he is "standing on a crossing or about to cross the track of the railway," and the *ratio decidendi* of the *Boisseau* case is, in my opinion, as applicable to sec. 276 as it was to former sec. 260.

Bennett v. *Grand Trunk R.W. Co.* (1883), 3 O.R. 446, is a decision in the same line as that in the *Boisseau* case as to the duty imposed by sec. 260 extending to the station grounds of a railway company.

The plaintiff is, I think, entitled to recover. The children having sustained no pecuniary damage, I have only to assess the damages to which the plaintiff is entitled. The deceased

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was sixty-five years old and his wife sixty-three; his wages were $1.10 a day, Sundays and holidays included, and his expectation of life was eleven years. Nine hundred dollars seems to me a reasonable sum at which to assess the damages, and I, therefore, give judgment for the plaintiff for that sum with costs.

STREET RAILWAY—NEGLIGENCE—APPEAL.

[PRIVY COUNCIL.]

TORONTO R.W. CO. v. KING.

[(1908) *A.C.* 260.]

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Verdict of jury upheld—Evidence properly submitted—Order granting new trial set aside—Practice—Special leave to cross appeal nunc pro tunc.

In an action for damages against the appellants for loss of life occasioned by the negligent management of their tramcar by their servant employed to drive it, the jury found that the servant was guilty of negligence in causing the accident and that the deceased was not guilty of contributory negligence, and judgment was accordingly entered for the plaintiffs:—

Held, that the Court in appeal from that judgment was in error in setting it aside and ordering a new trial, there having been evidence on both issues properly submitted to the jury. It is not valid ground for ordering a new trial that the Judges differ from the conclusion at which the jury have arrived or consider that the findings shew that the defendants had not had a fair and unprejudiced trial. Special leave to the respondents to cross appeal against the order for a new trial granted *nunc pro tunc;* the appeal praying that the action should be dismissed.

APPEAL by special leave from a decree of the Court above mentioned (November 3, 1906), ordering a new trial of an action in which Meredith, C.J. (February 18, 1906), had ordered judgment to be entered for the respondents on the findings of the jury.

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At the trial the appellants, under the circumstances stated by their Lordships, claimed a judgment of nonsuit at the close of the respondents' case . The trial Judge declined to hear argument on that point at the time, directed the case to go to the jury, and, after the jury brought in their findings, delivered judgment refusing the appellants' motion for a nonsuit upon the ground that there was "some slight evidence of negligence" which, according to the authorities in the Ontario Courts, made it impossible for him to withdraw the case from the jury, although he arrived at that conclusion "with considerable doubt"; he therefore directed judgment to be entered in favour of the respondents for the amount found due to them by the jury.

In appeal the Judges were divided in opinion. Three (Moss, C.J.O., Meredith and Maclaren, JJ.A.) decided in favour of a new trial; two (Osler and Garrow, JJ.A.) considered that the case should have been withdrawn from the jury and the action dismissed.

Meredith, J.A., delivered the judgment of the majority. He considered that the plaintiffs were embarrassed by the jury having said too much in their favour, indicating favour towards them or prejudice against the defendants, or possibly both. He then stated "that no reasonable and unprejudiced man could say that the deceased acted with ordinary care, or that the accident would have happened had he taken such care," and further on he found that "there was no reasonable evidence to support the finding of the jury to the effect that the deceased was not guilty of any negligence."

Osler, J.A., said: "I see no reasonable evidence of negligence on the part of the motorman. There is not, to my apprehension, the least evidence that he had any reason to suppose when he slightly accelerated the speed of the car, in the ordinary course of its management, that the deceased van driver intended or would attempt to cross the street in front of the car or would not slow up his vehicle as he came to the track, as he ought to have done, and as hundreds of drivers do every day"; and again he says: "Assuming that there was some evidence of negligence

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on the motorman's part by putting on power south of Adelaide Street, that would not entitle the plaintiffs to recover," for "both parties may be said then to have been in simultaneous and negligent motion when the collision occurred, and neither is in a position to complain of the consequences. This case, in my opinion, is one of reckless driving on the part of the unfortunate deceased, continued to the moment when it was too late to avoid the catastrope, and the result ought to be a judgment for the defendants."

Garrow, J.A., put it as follows: "The deceased, familiar with the locality in broad daylight, drove his horse and waggon, without pause, across a railway track, in front of an approaching car, which he could have seen and must have seen, and was, in consequence, struck and killed. What else was to have been expected? It was the obvious and not the extraordinary which happened. It may be that the motorman saw him approaching the track—he says he did—but was he bound to assume that the deceased intended to cross? I think not. There was not, in my opinion, a particle of evidence reasonably proper for a jury."

The appellants claimed that the action should have been dismissed, and the respondents gave them notice that they would support the verdict and judgment at the trial and would file, if necessary, a formal petition for leave to cross appeal against the order for a new trial.

Sir R. Finlay, K.C., and *D. L. McCarthy*, for the appellants, contended that judgment should have been entered for the defendants. There was no evidence of negligence which should properly have been submitted to the jury on the part of the appellants' motorman. There was no evidence that the motorman did not do everything which he reasonably could to avoid the collision when once the danger thereof had become imminent. Further, it was shewn upon the evidence and the admissions of the plaintiffs' counsel that the deceased driver of the waggon was negligent inasmuch as he could have seen the approaching car had he looked. He took no steps to avoid the accident, although he had ample opportunity to stop or to turn to either

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hand. If both parties were negligent, the case should have been withdrawn from the jury and the action dismissed. There was no evidence of reasonable care having been exercised by the deceased which was fit to be submitted to the jury. Reference was made to *Metropolitan R.W. Co.* v. *Jackson* (1877), 3 App. Cas. 193; *Dublin, Wicklow & Wexford R.W. Co.* v. *Slattery* (1878), 3 App. Cas. 1155; *Railroad Co.* v. *Houston* (1877), 95 U.S.R. 697; *Elliot* v. *Chicago, Milwaukee, etc., R.W. Co.* (1893), 150 U.S.R. 245; *Morrow* v. *Canadian Pacific R.W. Co.* (1894), 21 A.R. 149; *Allen* v. *North Metropolitan Tramways Co.* (1888), 4 Times L.R. 561.

F. E. Smith, K.C., and *A. J. Russell Snow,* K.C., for the respondents, contended that the findings of the jury after the evidence had been fairly submitted to them by the trial Judge were conclusive. There was evidence of negligence by the motorman, and evidence that there was no contributory negligence by the deceased; therefore there could not have been judgment of nonsuit, and the case could not have been withdrawn from the jury. The evidence of the motorman's negligence was that he slowed down as he approached the intersection of two streets (Yonge and Adelaide) which is a regular stopping place for cars which, like his own, were going north. He thereby invited the deceased to cross the lines, when, without looking out or giving any warning, he suddenly increased his speed and came into collision with the rear wheels of the deceased's waggon. That was evidence on which the jury's finding could be reasonably made, and should therefore be allowed to stand; for he thereby infringed rule 58 of the company's published rules. This negligence was the proximate cause of the collision. It was submitted that the judgment at the trial should be restored, and, if necessary, special leave to cross appeal should be given *nunc pro tunc* for that purpose. Reference was made to *Connecticut Mutual Life Insurance Co.* v. *Moore* (1881), 6 App. Cas. 644; *McArthur* v. *Dominion Cartridge Co.* (1905), A.C. 72.

Sir R. Finlay, K.C., replied.

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The judgment of their Lordships* was delivered by

LORD ATKINSON:—The action out of which this appeal arises was brought by the respondents, the representatives of one David King, deceased, who lost his life in a collision between a delivery van, which he was driving, and an electric tramcar belonging to the defendants (the appellant company); brought about (as it is alleged) by the negligent management of the tramcar by the servant of the company employed to drive it.

The street in Toronto in which the tramway line in question lies is named Yonge Street. It runs north and south, and is intersected at right angles by a street called Adelaide Street, running east and west. The collision took place "between lights," as it is said, early on the morning of December 21, 1904. Yonge Street, as it approaches the intersection of the streets has an upward gradient to the north of 1¼ in 100. Immediately before the collision the tramcar, having passed the line of the houses in Adelaide Street on its southern side, proceeded northward along Yonge Street on the right-hand line of rails. The deceased was coming along Adelaide Street from the west at, it is alleged, from six to eight miles an hour. It is obvious that he sought to cross in front of the tramcar. He nearly succeeded, for it was the afterpart of his vehicle which was struck. A second more would have saved him. The two vehicles, however, came into collision at a spot nearly midway between the lines of the buildings on the northern and southern sides of Adelaide Street, and the waggon was struck with such force that it was pushed along sideways for a distance of over twenty to thirty feet, with the result that the deceased was thrown out upon the road and killed.

There is no substantial conflict of evidence in the case. The important facts are, in the main, not disputed.

At the close of the plaintiff's case the defendants asked for a nonsuit on two grounds—(1) on the ground that there was no evidence to go to the jury that the driver of the tramcar had been guilty of any negligence in the driving or management of

*Lord Loreburn, L.C., Lord Macnaghten, Lord Atkinson, Lord Collins and Sir Arthur Wilson.

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his car, and (2) on the ground that during the progress of the plaintiff's case facts were proved, by the evidence of their own witnesses, which clearly established that it was the negligence of the deceased which caused the accident, and that the defendants were therefore entitled to a direction according to the principle established by the cases of *Metropolitan R.W. Co.* v. *Jackson*, 3 App. Cas. 193, and *Dublin, Wicklow & Wexford R.W. Co.* v. *Slattery*, 3 App. Cas. 1155, or, in other words, that, though there might be evidence to go to the jury that the driver had negligently driven and managed the tramcar, it was clear from the plaintiffs' own evidence that it was not the negligence of which the driver was guilty which caused the accident, but the folly and recklessness of the deceased himself. The learned Judge at the trial, Meredith, C.J., refused to nonsuit the plaintiffs, and at the close of the defendants' case left to the jury seven questions which, with the answers given to them, were as follows:—

Q. 1. "Was the injury to the deceased caused by the negligence of—

"(1) The motorman alone?" A. "Yes."

"(2) The deceased alone?" A. "No."

Q. 2. "Was it due to the negligence of both of them?" A. "No."

Q. 3. "In what did any negligence which you find consist?" A. "We find the motorman negligent, after slowing up at Adelaide Street, in again putting on power at this point without observing the approach of the deceased's waggon."

Q. 4. "Could the motorman, after the danger of collision being imminent became apparent to him, have avoided the accident by the exercise of reasonable care on his part?" A. "Yes."

Q. 5. "Ought the motorman, if he had exercised reasonable care, to have apprehended sooner than he did that a collision was imminent?" A. "Yes."

Q. 6. "If you answer 'yes' to question 5, could the motorman, when, in your opinion, he should have apprehended that a collision was imminent, have avoided the accident by the exercise of reasonable care on his part?" A. "Yes."

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Q. 7. "Damages?" A. "The widow, $3,000; the daughter, $1,500."

Upon these findings, Meredith, C.J., after consideration, and apparently with some doubt, entered judgment for the plaintiffs for the two sums of $3,000 and $1,500 respectively.

From this judgment the appellant company appealed to the Court of Appeal for Ontario, contending (1) that the plaintiffs should at the trial have been nonsuited, and (2) that the verdict entered up should be set aside on the ground (amongst others) that the damages were excessive.

Two of the Judges in the Court of Appeal, namely, Osler and Garrow, JJ.A., were of opinion that the verdict and judgment entered for the plaintiffs should be set aside and a verdict and judgment entered for the defendants. The effect of the judgment of the three Judges who formed the majority of the Court is summed up in the following passages from the judgment of Meredith, J.A.:—

"There was evidence to go to the jury on the question of negligence on the part of the driver of the car, in not seeing the deceased approaching, and the jury have found the defendants guilty of negligence in this respect.

"There being, then, negligence on both sides, the plaintiffs' action fails, unless, in the circumstances of this case, the driver of the car became aware of the man's danger, and, notwithstanding the latter's negligence, might, by the exercise of ordinary care, have avoided the accident.

"The trial Judge was of opinion that there was no evidence to go to the jury upon that question, but submitted it to them, and they have very plainly found it in the plaintiffs' favour. I am not quite able to agree in that opinion, but the whole of the findings of the jury, including the assessment of the damages, satisfy me that the defendants had not a fair and unprejudiced trial, and that the judgment and verdict should be set aside, and a new trial awarded."

Owing to certain proceedings subsequently taken by the parties, the damages have by order been reduced to $3,999,

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namely, $2,750 for the widow and $1,249 for the infant child, and on the hearing of this appeal no argument was addressed to their Lordships in reference to the alleged excessiveness of the damages found.

Their Lordships are of opinion, with all respect for the decision of the Court of Appeal, that no valid reason has been shewn for directing a new trial. The jury were fully and properly instructed by the learned Chief Justice. There is no preponderance of evidence in the case against which the jury have found. The facts are in the main admitted, or not disputed; the real matters in controversy are the inferences which it is proper to draw from those facts. It appears to their Lordships that the verdict and judgment must be entered either for the plaintiffs or for the defendants, and that the middle course of directing a new trial is not open.

Their Lordships think that there was evidence in the case proper to be submitted to the jury that the driver of the tramcar was guilty of negligence causing the accident, though, of course, they recognize that this is a question which may present itself differently to different minds.

Rule 58 of the defendant company's published rules is as follows:—

"Curves and Crossings.—When approaching crossings and crowded places where there is a possibility of accidents, the speed must be reduced and the car kept carefully under control.

"Go very slowly over all curves, switches, and intersections; never faster than three miles an hour, and extra caution must be used in handling double truck cars at such places.

"An intersection must never be taken when another car is approaching.

"Cross streets must not be blocked, nor must any crossing be taken until the road ahead is clear."

The driver of the tramcar, one James King, states in his evidence that when about the office of the World, some distance from the intersection of the two streets, he saw at least one waggon pass along Adelaide Street from west to east and cross the

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tram track he was about to traverse; that when he got within two or three lengths of his car from Adelaide Street he threw off the power, and allowed his car to roll on by its own momentum up the slight incline, so that he might slow coming to the crossing; that the speed of the car was lessening; that when he was about a car's length (about thirty feet) south of the line of the buildings in Adelaide Street, he looked along that street east and west for the first and only time, but saw nothing approaching, and seeing, as he thought, a clear space, just as he himself was in line with the south line of Adelaide Street, he put on his power gradually to proceed on his route. In his evidence there is this passage:—

Q. "Then your story is that at the south line—street line—of Adelaide, you started to put on your power, put it on gradually till you got up to five, when you saw the rig about half a car length ahead of you?" A. "About twenty feet; just on an angle across."

Q. "Where was the horse when you first caught sight of the ——?" A. "Just coming on to the west rail of the west track."

Q. "Is that what you mean?" A. "Yes."

Q. "The width of the devil strip is about three feet. Then we had it said the width of the railway line is four feet eight and a half. That would be about eight feet, then, west of the rail?" A. "Yes."

Q. "And you were about fifteen feet, then, from that point. Did he come along just the same pace that you had seen him going?" A. "That was the first time I had seen him."

Q. "And he was going along about that pace you are telling me of, and kept that pace up till the accident?" A. "Yes."

Q. "Did not slow up?" A. "No."

Q. "Did not hasten up. Just went at the same pace?" A. "Yes."

Q. "Whereabouts did you hit the waggon? A. "Just in front of the hind wheel; struck the hind wheel just in front of the hub."

From the distance which the waggon was carried or pushed after it was struck, it is evident that the tramcar must have

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acquired considerable way before the collision. It is vital to consider what was the driver's field of vision at the time he looked up and down Adelaide Street. If the map be at all accurate, he could not possibly have seen more than 100 feet, about thirty-three yards, down that street to the west. If the deceased were driving even at the rate of six miles an hour he would traverse this space in about ten seconds, yet the driver, without looking again, concluded the space was clear, proceeded to put on his power, and cut across this thoroughfare. It appears to their Lordships impossible, having regard to these facts, to hold that there was not evidence to go to the jury of actionable negligence on the driver's part. Their Lordships are further of opinion that the deceased, in attempting to cross in front of the tramcar, as the driver of the latter in the above-noted passage says he did (the man, unfortunately, cannot speak for himself), was not clearly guilty of the "folly and recklessness" causing his death which Lord Cairns, in his judgment in *Dublin, Wicklow & Wexford R.W. Co.* v. *Slattery*, 3 App. Cas. 1155, at p. 1166, refers to as sufficient to entitle the defendants to a direction. It is suggested that the deceased must have seen, or ought to have seen, the tramcar, and had no right to assume it would have been slowed down, or that its driver would have ascertained that there was no traffic with which it might come in contact before he proceeded to apply his power and cross the thoroughfare. But why not assume these things? It was the driver's duty to do them all, and traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less upon the assumption that the drivers of all the other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets. To cross in front of an approaching train, as was done by the deceased in *Slattery's Case*, 3 App. Cas. 1155, at 1166, is one thing; to cross in front of a tramcar bound to be driven under regulations such as those above quoted, at such a place as the junction of these two streets, is quite another thing.

It may well be that the driver, when he saw the deceased, did everything possible to avert the accident. Meredith, C.J., was of

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opinion that there was no evidence to sustain the finding that he was guilty of negligence in this respect. But it was then too late. Despite his efforts the way was not taken off the car sufficiently to prevent its striking the waggon with a force the nature of which is manifested by the result.

Their Lordships are, therefore, of the opinion that the defendants were not entitled to a nonsuit; that there was evidence to go to the jury on the two issues—(1) whether the driver of the tramcar was guilty of negligence causing the accident; and (2) whether the deceased was guilty of contributory negligence. The jury have practically found these issues in favour of the plaintiffs. They are the tribunal entrusted by the law with the determination of issues of fact, and their conclusions on such matters ought not to be disturbed because they are not such as Judges sitting in courts of appeal might themselves have arrived at. In their Lordships' opinion there is no ground in this case for setting aside the jury's findings. The plaintiffs, they think, are entitled to have a verdict entered for them for the reduced sum at which the damages have been fixed.

Their Lordships will humbly advise His Majesty that the judgment of the Court of Appeal of Ontario ought to be discharged with costs, and the judgment of the High Court confirmed, with the substitution of $2,750 for $3,000, and $1,249 for $1,500. The appellants will pay the costs of this appeal.

The respondents in their printed case asked that the judgment of the Court of Appeal might be set aside and the verdict of the jury restored. Some doubts having arisen whether they were competent to do so on this appeal, without having first lodged a cross petition in that behalf, their Lordships, being of opinion that the necessary relief would undoubtedly have been granted to them if they had applied for it at the time when the appellants obtained special leave to appeal, allowed the respondents at the hearing to put in such a petition *nunc pro tunc*, and they will humbly advise His Majesty to grant this relief.

Solicitor for appellants: *Harrison & Powell.*
Solicitors for respondents: *Blake & Redden.*

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STREET RAILWAY—NEGLIGENCE—NEW TRIAL.

ONTARIO.] [COURT OF APPEAL.

HINSLEY v. LONDON STREET RAILWAY COMPANY.

(16 *O.L.R.* 350.)

Railways—Accident—Negligence—Contributory Negligence—Non-disposal of—Questions in Issue—New Trial.

The deceased, in attempting to cross over one of the streets of a city on which there were street car lines, passed behind one of the cars, and was just stepping on to the track on which cars coming in the opposite direction ran, when she fell and was struck by an approaching car and killed. In an action brought to recover damages therefor, the jury, while finding that there was negligence on the defendants' part in running at too high a rate of speed, and that there was contributory negligence on the plaintiff's part in not taking proper precautions before attempting to cross, also found that the defendants could have avoided the accident had the car been running at a reasonable rate of speed. Upon their answers judgment was entered for the plaintiff:—

Held, Garrow, J., dissenting, that on these findings, the judgment could not be supported, and a new trial was directed.

THIS was an appeal by the defendants from the judgment, at the trial before Meredith, C.J. C.P., and a jury, in favour of the plaintiff.

The action was tried at London, on January 9th, 1907.

G. C. Gibbons, K.C., and *F. F. Harper*, for the plaintiff.

I. F. Hellmuth, K.C., and *C. H. Ivey*, for the defendants.

The action was brought by the plaintiff, as administrator of the estate of Maud Amelia Hinsley, deceased, to recover damages for injuries to her, causing her death, through the alleged negligence of the defendants' servants in the operation of a street car upon the defendants' railway in the city of London.

The deceased, on the 12th September, 1906, was attempting to cross Dundas street, in the city of London, a short distance east of Colborne street, behind one of the defendants' street cars. She had got over the track on which that car was, and had stepped on to the track on which the cars coming in the opposite direction ran, when she fell, and was struck by an approaching car, and was killed.

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The additional facts, so far as material, are set out in the judgment of GARROW, J.A.

The questions submitted to the jury, with their answers thereto, were as follows:

1. Were the defendants guilty of negligence? A. Yes.

2. If so, in what did the negligence consist? A. Running at too high rate of speed.

3. Was the plaintiff guilty of contributory negligence? A. Yes.

4. If so, in what did her negligence consist? A. In not taking the necessary precaution before stepping on the north track.

5. Could the motorman, after the condition of danger of the deceased became, or ought to have become, apparent to him, by the exercise of reasonable care, have prevented the accident? A. Yes, if he had been running at a reasonable rate of speed.

6. By whose negligence were the injuries to the deceased which resulted in her death caused? A. The defendants.

They assessed the damages as follows: To the husband, $500; to the daughters, Florence Adella, six years old, $1,000; Violet May, a year old, $1,000.

Upon these findings the learned Chief Justice directed judgment to be entered in favour of the plaintiff. From this judgment the defendants appealed to the Court of Appeal.

On May 10th, 1907, the appeal was heard before MOSS, C.J.O. OSLER, GARROW and MACLAREN, JJ.A.

I. F. Hellmuth, K.C., for the appellants.

G. C. Gibbons, K.C., and *G. S. Gibbons*, for the respondent.

The arguments sufficiently appear from the judgments.

March 24, 1907. MOSS, C.J.O.:—This appeal has been the subject of much discussion and consideration.

In the result I have been unable to bring myself to the conclusion that, upon the answers of the jury, the judgment entered for the plaintiff can be sustained. On the other hand, it is quite

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clear that the jury did not deal with or dispose of all the questions in issue, and, consequently, the case must go back for another trial upon the whole case.

The difficulty in the plaintiff's way arises from the manner in which the jury answered the fifth question.

There was ample evidence to support the finding in answer to the second question, that the defendants were negligent in running their cars at too high a rate of speed, and, although the evidence bearing on the third and fourth questions is not so clear or satisfactory that another jury might not find the other way upon them, it cannot be said that there was not evidence upon which the jury might find, as they did, that the deceased was negligent in not taking the necessary precautions before stepping on the north track. Upon these answers, had the matter rested there, there could have been but one verdict entered, viz., for the defendants.

While, undoubtedly, the defendants were doing a negligent and dangerous act in running their car at too high a rate of speed, that in itself would not have brought about the accident. Another needful element was that the deceased should have got upon the track in front of the car, and this, it is found, she did negligently. She fell as she came upon the track, and the accident became inevitable, but there is also room for the jury to conclude that, even if she had not fallen, she would not have escaped being struck by the swiftly moving car.

If the jury had answered the fifth question by a simple affirmative, it might be held that there was evidence upon which to base it. But the qualification which the jury attached to their answer creates a serious difficulty. Read in the light of the evidence, it indicates an opinion that the motorman, with all his faculties about him, fully apprehending the situation, and doing everything in his power, found it impossible to bring the car to a stop in time to prevent the deceased's death, because the speed of the car was such as to overcome all his efforts in that direction. That may or may not have been the proper conclusion, but I am unable to see that it assists the plaintiff. In what respect does it

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neutralize or avoid the negligence of the deceased in placing herself in front of the car?

The substance of the findings is that the speed of the car was such that it was impossible for the motorman to avoid a collision with the deceased if she came upon the tracks at the time and place at which she did. Unfortunately, she did come upon it, and the jury say that her act was negligent. If that be the case, then the joint negligence was the cause of the accident. And the further finding, phrased as it is, does not, in my opinion, relieve the plaintiff from the consequences of the deceased's negligence, or justify a verdict in his favour.

I agree that there must be a new trial upon the whole case.

OSLER, J.A.:—I had written a judgment dealing at some length with the various questions argued before us, but it is needless at present to say more than that my conclusion is that the answers of the jury to the questions submitted to them, read in connection with the charge of the learned trial Judge, do not entitle the plaintiff to judgment on the only act or acts of negligence found by them. Another act of negligence in reference to the management of the fender of the car was, however, also relied upon, but the jury were told that they need not consider this if they found for the plaintiff on the other grounds which we now hold not to be tenable, and it was accordingly not passed upon by them. We cannot say that there was not some evidence of negligence in this respect, and therefore there must be a new trial. Costs of the last trial to abide the event. Costs of appeal to the defendant in any event.

I refer to the recent case of *Butterly* v. *Mayor of Drogheda*, [1907] 2 Ir. R. 134, 150 C.A., where the case of *Reynolds* v. *Tilling* (1903), 19 Times L.R. 539, is discussed and considered: *Brenner* v. *Toronto R.W. Co.* (1907), 15 O.L.R. 195; *Brown* v. *London Street R.W. Co.* (1901), 31 S.C.R. 642, at pp. 651, 652, *per* Davies, J.; Beven on Negligence, 3rd ed., vol. 1, p. 179; *Brown* v. *Northern Ohio Traction Co.* (1907), 10 L.R.A. N.S. 421; *The Bernina* (1887), 12 P.D. 58, at p. 88–9; *Wakelin* v.

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London and South Western R. W. Co. (1886), 12 App. Cas. 41, 45–6; Street on the Foundations of Legal Liability, vol. 1, 139, and Pollock on Torts, 7th ed., 457.

GARROW, J.A.:—The acts of negligence alleged in the statement of claim were: (1) excessive and dangerous speed; (2) the deceased fell, and if the motorman had had his car under proper control, and had not been running at too great a rate of speed, he could have stopped the car and prevented the injury; (3) imperfection in the fender; and (4) incompetency of the motorman in the use of the fender.

The defence was a denial of the negligence alleged, and contributory negligence on the part of deceased.

The facts are not in serious dispute.

The deceased, on September 12th, 1906, was crossing Dundas street when she was struck by a car and killed. She had just seen her father-in-law off upon an east-bound car, and had passed around the rear end of that car and the trailer attached, and was in the act of crossing the other or north track when she tripped and fell, and was run over by a west-bound car running upon that track.

The evidence as to the distance of the approaching car from deceased when she fell varies from about four feet up to about fifty feet. There was evidence of excessive speed, and that the fender had not been tripped, and that the motorman had not been instructed as to its use.

In his charge the learned Chief Justice, among other things, said to the jury:

"Then comes the next question. Assume that you come to the conclusion that the woman got into a place of danger through her own negligence, still that does not disentitle these plaintiffs to recover if you further find that, after she had got into a position of danger, and that position of danger came to the notice, if he had been vigilant, of the motorman, he, by the exercise of reasonable care, might have avoided the accident. Though the woman might have been negligent, her representatives are, never-

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theless, entitled to recover, because the final negligence—the effective negligence—is the omission to discharge the duty to prevent the accident when the danger is apparent and when the means are at hand to prevent it. . . ."

. . . "If they were running at a reckless rate of speed, too high if the woman was not negligent, or if she was negligent even, if they might by the exercise of reasonable care, *had they been going at a reasonable rate*, and had they used the proper appliances, have prevented the accident, then the plaintiff would be entitled to recover." . . .

The charge was objected to by counsel, and this took place:

"*Mr. Hellmuth:* I submit your Lordship should not have told the jury, in regard to the question if the motorman saw or should have seen the danger, and could then have avoided the accident, the defendants would be liable. In your charge in regard to that, your Lordship said that if the car had then been going at a reasonable rate of speed. I submit your Lordship should not have said that.

"HIS LORDSHIP: I think if anything, I erred on your side.

"*Mr. Hellmuth:* I submit the original negligence here charged is running at too great a rate of speed.

"HIS LORDSHIP: Surely you do not argue that if a man is propelling a car at too high a rate of speed, such a high rate of speed that he cannot use the appliances effectively, he is relieved from the consequences of the rule because the plaintiff alleges negligence in running too fast?

"*Mr. Hellmuth:* I submit that is the result of the *Brown* case. ". . . Then I submit that your Lordship should have said that, under the facts in evidence here, the jury were bound to find contributory negligence.

"HIS LORDSHIP: I think, if I had been finding, I would find against you on this evidence.

"*Mr. Gibbons* (counsel for the plaintiff): I want to object that there is no evidence of contributory negligence at all on the part of the deceased."

The jury found: (1) that the defendants were guilty of negli-

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gence; (2) in running at too high a rate of speed; (3) that the deceased was guilty of contributory negligence; (4) in not taking the necessary precaution before stepping on the north track; (5) that the motorman could, after the condition of danger of deceased became apparent, or might have become apparent, to him, by the exercise of reasonable care, have prevented the accident *if he had been running at a reasonable rate of speed*; (6) that the injuries to the deceased resulting in her death were caused by the negligence of the defendants; and (7) they assessed the damages at, to the husband, $500; to Florence Adella, $1,000; and to Violet May, $1,000; upon which findings judgment was entered for the plaintiff.

I am of the opinion that the charge is not open to Mr. Hellmuth's objection. When it was delivered there had, of course, been no findings to complicate the matter. The learned Chief Justice was merely instructing the jury as to what they might find upon the evidence, and one thing they were certainly at liberty to find was that the speed of the car was so unreasonable and excessive as to prevent the motorman from having proper control, and that, had he being going at a reasonable speed and using the appliances at hand, the accident might have been avoided, notwithstanding the negligence of deceased. And, in my opinion, that is the proper construction of what the learned Chief Justice said.

The objection of counsel for the plaintiffs, that there was no evidence of contributory negligence, is not, I think, well founded. There certainly was some evidence, although, I think, sufficient attention was not directed to the important circumstance that the deceased fell and was struck by the car while prostrate. If she had not fallen, it may be that she would have crossed in safety, especially if, as some of the witnesses say, the oncoming car was distant about fifty feet. In Toronto people constantly cross with a narrower margin, and if she might have succeeded but for the fall, a jury might reasonably find that her negligence (if any) in making the attempt ceased with the fall.

Mr. Hellmuth, before us, contended that the original negli-

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gence found by the jury, namely, excessive speed, could not be made to do duty twice; that it was completely met by the finding of contributory negligence; and that, unless some new act of negligence appeared, the defendants were entitled to succeed; or that, at all events, the findings were contradictory, and a new trial should be ordered. And in support of his first proposition he relied upon the case of *Brown* v. *London Street R.W. Co.*, 31 S.C.R. 642. But that case is clearly distinguishable by the circumstance that what is here the fifth question, and there the sixth, was answered here in the affirmative and there in the negative.

My chief difficulty has been to understand, and, if possible, harmonize, the several findings of the jury—certainly not an easy, but, I think, a not insuperable, task. And the main difficulty is, of course, created by the finding of contributory negligence.

The questions, I assume, were prepared by the learned Chief Justice, and the construction of the answers was, of course, for him. And, in doing so, he was entitled to have regard to the issues, the undisputed facts, the evidence, and his own charge, as well as to the findings themselves, with the view to producing, if reasonably possible, a harmonious result disposing of the action one way or the other. And in case of obscurity or apparent contradiction, he was, I think, at liberty to disregard the mere order, and even the mere language of the questions and answers, if the meaning, having regard to all the circumstances, was reasonably clear. So regarding the matter, it appears to me plain, as it must have done to the learned Chief Justice, that the jury intended to find for the plaintiffs. Their findings paraphrased amount, in my opinion, to this: the deceased, in going upon the north track without taking the necessary precautions, was negligent, but the defendant could, after becoming aware of her position and danger, have avoided the accident by the exercise of reasonable care in the control and management of the car. And if this paraphrase is correct, the judgment should stand. Its correctness depends on the view taken of the finding of contribu-

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tory negligence, for with that finding modified to what I regard, upon the facts, as its proper dimension, all difficulty disappears.

That such a finding is not inviolable is, I think, well established. In the case before referred to of *Brown* v. *London Street R.W. Co.*, Gwynne, J., evidently considered it to be his duty to examine the facts, as well as the charge to the jury, in order to determine what weight should be attached to a similar finding. And a course similar in principle was adopted, with the apparent approval of the Court of Appeal, by Walton, J., in *Reynolds* v. *Tilling*, 19 Times L.R. 539, 20 Times L.R. 57; and see also *Butterly* v. *Mayor of Drogheda*, [1907] 2 Ir. R. 134.

In the *Brown* case it appeared, and is, indeed, largely the basis of the judgment, that the charge to the jury had properly explained the law as to contributory negligence. The term is not self-explanatory, and under its guise of apparent simplicity is one well calculated to mislead the lay mind. As defined by the authorities, and as known to those learned in the law, it, of course, means negligence continuing as a contributing cause down to the happening of the injurious occurrence: see *The Bernina*, 12 P.D. 58, p. 61, and (1888), 13 App. Cas. 1. But to the unlearned this is apt to be overlooked, and any prior negligent act, however isolated or complete, to be regarded as "contributory."

And if I were to criticize the charge, it would be to say that I fail to find in it an adequate, or, indeed, any, explanation of what in law contributory negligence means, an omission which, in my opinion, goes a long way towards accounting for the apparently contradictory nature of the answers. The jury evidently adopted, without understanding, the language of the third question, to characterize the act of the deceased in going upon the track without taking the necessary precautions, which act might or might not be contributory negligence, according to what view was taken of the undisputed fact that she fell, and of the conflicting evidence as to the distance away from her at that time of the approaching car. If the distance was only four feet, it would be quite reasonable to regard her negligence as continuing, and even as causing the accident, as she must in that case have

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been struck in any event, even by a car proceeding at a reasonable rate of speed. But if the distance was as great as some of the witnesses deposed to, and a car proceeding at a reasonable rate of speed might, after the position and danger of deceased became apparent, have been stopped in time to avert the collision, a conclusion open to the jury upon the evidence, then the negligence, if any, of the deceased might well have been, as I think it was, regarded as at an end as a contributing cause when she fell, and the excessive rate of speed alone became the final or effective cause. And this view of the facts is the one which apparently commended itself to the jury, to judge by their answers to the fifth and sixth questions, which may, as a matter of construction, under all the circumstances, be safely regarded as having modified the third answer to the extent of eliminating the "contributory" nature of the negligence therein, and in the next answer found. With the result that, I think, the judgment was right, and that the appeal fails.

The alternative would have been a new trial, which, while of some advantage in clearing up what is doubtful, including the question of the fender, which does not appear to have been passed upon, would only, in my opinion, entail large additional costs, with no reasonable prospect of ultimate relief from the claim, which, depending, as it does, upon disputed facts, must in the end be passed upon by a jury, with, as experience proves, as the inevitable, or at least the usual, result of a finding in favour of the plaintiff.

MACLAREN, J.A., concurred with Moss, C.J.O.

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STATION ROAD—SIGNALS—NEGLIGENCE.

NORTH-WEST TERRITORIES.] [SUPREME COURT.

HANSEN v. CANADIAN PACIFIC R.W. Co.

(*See* 4 *West. L.R.* 385).

Railway—Injury to person by train—Negligence—Contributory negligence—Omission to give warning of approach—Sidewalk—Way of access to station—Highway—Jury—Misdirection—New trial—Prime cause.

The plaintiff a contractor for supplying milk to the defendant's dining cars after having delivered the milk in the freight shed was returning with the empty milk cans as was his usual practice.

He was proceeding around the south-west corner of the station down a sloping platform at a run when just at that time a train on the shunting track which he had to cross arrived a short distance north of the sloping platform and the sidewalk which lead from it across the track. The plaintiff fell and the hind trucks of the nearest car passed over his foot.

Held, 1. That the sloping platform was a dangerous way under the circumstances and its structure in that way negligent.

2. The omission to ring a bell or blow a whistle or give some other proper signal to indicate the approach of the train, and that the engine was backing down the shunting track at an excessive and dangerous rate of speed were acts of negligence.

3. The proximate cause of the accident was not the heedlessness of the plaintiff in running but the dangerous character of the sloping platform which prevented him from avoiding the accident when he perceived his danger.

APPEAL by defendants from judgment of Harvey, J., upon the verdict of a jury, in favour of plaintiff in an action for personal injuries sustained by plaintiff owing to the alleged negligence of defendants.

R. B. Bennett, Calgary, for defendants.

J. Muir, K.C., and *Crawford*, Calgary, for plaintiff.

The judgment of the Court (Sifton, C.J., Wetmore, Scott and Newlands, JJ.) was delivered by

October 19, 1906. WETMORE, J.:—Defendants operate a railway running north from Calgary to Strathcona, and Red Deer is a station on such line of railway. The station house and freight shed face the west, the railway running from south to north.

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There is a platform running along the front of the buildings and the southern end thereof, and such platform, after it passes the south-west corner, slopes down eastward to the level of the railway. The main line is on the west side of the station buildings, and on the east side is a shunting track, or what the witnesses call "a house track," extending from a point some distance north of the buildings to a point some distance south of them. A portion of the town of Red Deer is on the east side of the railway right of way, and the company constructed a sidewalk extending across the house track from where the slope of the platform strikes the level until it meets with the platform of the town at the edge of the right of way. The plaintiff was under contract with the defendants to supply them with milk for their dining cars. The usual mode for persons residing at Red Deer on the east side of the track, having any business to transact at the station house such as for the purpose of purchasing tickets, going there for transportation, or for any other business, was to go by this sidewalk and up the sloping platform. This sidewalk, therefore, was largely used, a hundred people a day and upwards going to and fro on it. Persons also going from the trains to the hotels on the east side for meals usually used this sidewalk.

On the morning of 26th August, 1905, plaintiff came to deliver his milk at the station as usual. He tied his horse a short distance from the house track and proceeded with his milk cans along a portion of the sidewalk and up the sloping platform, around the south-west corner of the station house, and then north on the platform to the freight shed, where he left his milk cans and proceeded to return by the same route with the empty cans he found there. This was the usual practice. He stopped at the office of the station house and left the key of the freight shed with the agent there. He then proceeded around the south-west corner of the station house and down the sloping platform to return to his team. Just about this time an engine with four box cars in front of it was being backed down the house track, and the most southerly car had arrived a short distance north

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of the sloping platform and of the sidewalk. Plaintiff fell, and the hind trucks of this car passing over his foot almost took it off. The foot and part of the leg had to be amputated.

Plaintiff, alleging that this accident was brought about through the negligence of defendants, or their employees, brought this action.

Of course the usual question arises whether the negligence of the company or that of plaintiff was the proximate cause of the injury. The alleged acts of negligence upon the part of defendants were that, owing to the location of the station buildings, a person coming around the south-west corner of the buildings and down the sloping platform was not able to perceive a train coming on the house track from the north until it was very close to the foot of the slope, and therefore the situation was dangerous, and that that danger was accentuated by the fact of the existence of the sloping platform, and that that being so a bell should have been rung or whistle blown, or some other mode taken of warning persons coming down such slope, of the approaching train. It was also alleged that upon the occasion in question, in view of circumstances I have mentioned, the cars were being backed down at an improper rate of speed. Defendants contend that plaintiff brought the injury upon himself by his own carelessness and heedlessness; that he came round the south-west corner of the station house, and down the sloping platform running, and without taking any proper precautions whatever to look out to see if a train was approaching.

The trial Judge directed the jury that the sidewalk was a highway, and that it was the duty of the defendants, under the Railway Act, to ring a bell before approaching it. A verdict was given for plaintiff, and defendants appealed. The defendants also contend that there were no acts of negligence upon their part or upon the part of their servants.

I am of opinion that there was evidence from which the jury were at liberty to find that this sloping way was a dangerous place to a person going down it when a train was coming from the north on the house track, and that the sloping way under the

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circumstances, was dangerous, and that its structure in that way was negligent. I am of opinion that the Judge was in error in directing the jury that this sidewalk was a highway, but, apart from that, I am of opinion that there was evidence from which the jury might find under the circumstances that the omission to ring a bell or blow a whistle, or give some other proper indication of an approaching train, was an act of negligence. In the first place, so far as plaintiff was concerned, he had a right to be there; he was a contractor with the company, as I have stated, and he went there for the purpose of delivering milk he had agreed to deliver, and that was the proper place for delivering it. There is no question that he went there by the usual and proper and customary way, and I think in so far as this question is concerned the case comes practically within *York* v. *Canada Atlantic Steamship Co.*, 22 S.C.R. 167. Moreover, the company had built this sloping platform and sidewalk for the purpose of enabling persons coming to and going from the station to pass to and fro thereon; in other words, they invited that portion of the public to do so, and under those circumstances, where there was danger such as I have stated, it was their duty, apart from any statutory enactment, to take reasonable steps to prevent accidents occuring. In *Smith* v. *Niagara and St. Catharines R.W. Co.*, 9 O.L.R. 158, p. 160, 4 O.W.R. 526, 4 Can. Ry. Cas. 220, Street, J., who delivered the judgment of the majority of the Court, lays down the following: "The cases seem to have established that apart from that section (the 256th section of the Railway Act of 1888) and in case in which it is not applicable, a duty is cast upon the defendants to take reasonable precautions at dangerous points for the avoidance of accidents."

In my opinion, there was evidence from which the jury could find that no bell was rung or whistle blown or any proper precautions taken such as the dangerous character of the place required. It is true that the brakesman swore that the bell was rung and was ringing all the time, but several witnesses were in a situation to hear the bell if it had been rung, and they all swear that they did not hear it. In fact no one witness who was

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called and who was in a situation to hear the bell if it had rung, heard it, except these two brakesmen, and it is a significant fact, to my mind, that the person who the defendants alleged rang the bell, who, I presume, was the fireman, and who would know if it was rung, was not called. We find in all these cases where the question arises with respect to the ringing of a bell, that the employees of the railway company almost invariably state that it was rung. I do not say that their evidence should be disregarded, but I do say that it should be very carefully scrutinized; and I think, where a number of respectable witnesses, who were in a position to hear, swear they did not hear it, that the jury are at liberty to draw the conclusion that the employees of the company who swear to the bell being rung were mistaken.

I am also of opinion that there was evidence from which the jury could find that under the circumstances the train was backing down the house track at an excessive and dangerous rate of speed. The evidence established that it was going down at least at the rate of 10 miles an hour. Of course there was conflicting evidence as to the distance an approaching train, coming from the north on this track, could be seen from the south end of the platform. That, however, was a question entirely for the jury.

As to negligence on the part of plaintiff, there is no doubt that he came round the south-west corner of the building, and at least part of the way down the slope, running. It is true that in one place he says that he did not, that he was walking fast, but immediately afterwards he practically withdraws that, and he says that he doesn't think he was running. However, the evidence of the boys who were at the south end of the platform as he passed, establishes that beyond controversy. I have no doubt, therefore, that the evidence establishes that he did not approach and go down this dangerous place cautiously. To use a common expression he didn't "stop, look, and listen," and if the evidence stopped there I would have no hesitation in holding, under the authorities, that his own heedlessness and thoughtlessness were the proximate cause of the accident, and that he could

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not recover. He was fully aware of the dangerous character of the situation, he had frequently passed up and down the sloping platform, he was aware of the fact that the station buildings obscured the approach of a train from the north, and, moreover, when he was approaching the station, he saw what was no doubt a freight train, the engine of which was the one that pushed these cars down the house track, standing at the switch north of the station house.

There is a circumstance, however, in this case which, in my opinion, takes it out of the "stop, look, and listen" rule, if the jury found the facts as I am about to state, and I must assume that they did so find. The verdict was an open verdict; no special questions were answered; and I must assume that the jury found every fact in favour of plaintiff that it was necessary to find in order to support their verdict. Plaintiff swore that as he got half way down the slope he noticed the car backing down, that he endeavoured to stop and save himself by throwing himself back, but that by reason of the slope of the platform he was unable to do so, and his foot slipped and went under the car so that the hind truck went over his foot, as I have mentioned. It was open to the jury, to my mind, to find that if that sloping platform had not been sloping, plaintiff, when he became aware of the approach of the car, would have been able to have saved himself and thus have avoided the accident, but that, owing to the dangerous character of the sloping platform he was not able to do so, and therefore the negligence of the defendants in respect to that platform was the proximate cause of the injury. It would be idle for me to dispute the "stop, look, and listen" rule; it is too late for me to do so; that rule has, in my mind, been firmly established by authorities which are binding upon me and this Court, but I can find no case which goes so far as to apply that rule to the circumstances which I am just discussing. A man may be heedless, he may be reckless, he may in his heedlessness and recklessness be to blame, but surely if, before any injury was done, he discovered where his heedlessness was leading him, and he was then in a position to recover himself and prevent the

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injury, and attempted to do so, but failed, by reason of some act of negligence on the part of the defendant which prevented him, it is open to the jury to find that the proximate cause of the injury was not the heedlessness of the plaintiff, but was the negligence of the defendants. If that is not so, then, whenever the facts established the existence of the "stop, look, and listen" rule, the functions of the jury cease, and the plaintiff is put out of Court. I cannot believe that to be the law.

Judgment cannot be entered in this case, however, for the plaintiff, because I am of opinion that the learned Judge misdirected the jury in directing them that the sidewalk was a highway, and that therefore they were bound to ring a bell. Even if the sidewalk was a highway, some doubt may arise as to whether there was a statutory duty to ring a bell as the train was moving along on a shunting track. There are cases in which it has been questioned that they are bound to do so under such circumstances. However, I put my judgment upon the fact that the evidence did not establish that this sidewalk was a highway. The trial Judge founded his direction on the provisions of the Railway Act of 1903, sec. 2, paragraph (*i*), which is as follows: "The expression 'highway' includes any public road, street, lane, or other public way or communication." It will be observed that this provides that any "public" road, etc., shall be a highway. I am of opinion that this was not a public way in the sense intended by this paragraph of the Railway Act. The question came up in *Royle* v. *Canadian Northern R.W. Co.*, 14 Man. L.R. 275, 3 Can. Ry. Cas. 4. In that case the question arose as to what constituted a highway within the meaning of the Railway Act, 1888. That Act defined the expression "highway" exactly as it is defined in the Act of 1903. Dubuc, J., who practically delivered the judgment of the Court, at p. 281, quoted from Wharton's Law Lexicon, giving the definition of the word "highway" as follows: "Highways, public roads, which every subject of the kingdom has a right to use. They exist either by prescription, by authority of local Acts of Parliament, or by dedication to the use of the public."

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The only way in which it could be said that the way in question was a highway was by dedication. In *Moore* v. *Woodstock Woollen Mills Co.*, 29 S.C.R. 627, it was laid down that in order to constitute a highway by dedication there must be two things: "(1) An intention on the part of the owner of the land to dedicate, and (2) an acceptance by the public of such road as a highway. This is evidenced by user." The intention to dedicate or not is a question of fact, and must depend upon circumstances. Now I cannot conceive that a railway company inviting the public who have business to transact on their premises to approach and to depart from them over a way of this character, would ever have any intention to dedicate such method of approach and departure as a highway; it was simply an invitation to persons to go to and from their premises for business purposes, such as a merchant who has built his store away from a street might intend by building a platform from the street to his store for the convenience of persons who wanted to deal with him to come and go thereon; or a private individual having a house back from the street, say with a lawn in front of it, might intend by building a pathway from the street to his house, to invite persons and guests who have occasion to go to the house to come and go by that way. Moreover, in the case of a railway company in this country, or any country, we know that they are continually shifting their buildings, and laying down new tracks in and about their stations. Suppose this company undertook to put their station house and station buildings in another place (as such companies frequently do), if there was a dedication, this sidewalk would remain a highway; no matter where they shifted their station buildings to, the company could not get rid of that fact without possibly an Act of the Legislature, and if they desired to lay new tracks for their railway purposes they could not cross this sidewalk, if dedicated, without permission from the proper authorities. I cannot conceive that the company ever intended to put themselves in that position. I am therefore of opinion, that there must be a new trial in this case, because, notwithstanding what I have held as to its being open to the

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jury, under the circumstances of this case, to find that the defendants ought to have rung the bell and didn't ring it, they may have considered, in view of the trial Judge's authority, that it was not necessary to make any finding upon the question because, on the learned Judge's direction, they were bound to ring the bell any way.

Appeal allowed without costs, and new trial ordered. The defendants to have their costs of this appeal if they are successful in the final disposition of the action. The costs of the first trial to be costs in the cause to each party.

The new trial as ordered took place on the 1st, 2nd and 4th days of February, 1907, before Stuart, J., with a jury who increased the verdict of the plaintiff to $6,500.

The defendants appealed a second time to the Supreme Court of the North-West Territories.

July 16, 1907. The judgment of the Court (Sifton, C.J., Wetmore, Scott and Harvey, JJ.) was delivered by

HARVEY, J.:—This action was first tried before me with a jury, and a verdict given against the defendants for $3,500, upon which I directed judgment to be entered for the plaintiff. On appeal the Court (4 West. L.R. 385) sent the case back for a new trial on the ground that I had misdirected the jury in stating that the platform where the accident occurred was a highway. A new trial was held before my brother Stuart with a jury, when a verdict for the plaintiff for $6,500 was rendered on which he directed judgment to be entered in favour of the plaintiff, from which judgment the defendants now appeal. It is admitted that the evidence in the second trial does not vary in any essential from that on the former trial, though there were slight differences and a little more evidence on one or two points. It was held by this Court on the first appeal that there was evidence from which the jury might find that the defendants had been guilty of negligence which was the proximate cause of the injury, and in view of the similarity of the evidence it appears necessary to do little more than accept that judgment

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upon that point. I may, however, refer to a case decided by the Supreme Court of Canada since that judgment was given —*Wabash R.W. Co.* v. *Misener,* 38 S.C.R. 94, 6 Can. Ry. Cas. 70. This case, in my opinion, limits the "stop, look and listen" rule and recognizes the jury's right to decide what a reasonably prudent man would do under given circumstances as well as to determine the proximate cause of the accident, when there is evidence of negligence on the part of both parties. The Chief Justice at p. 99 says: "I assume, however, that to reach a conclusion as to which of the two parties is responsible for the accident, admitting that both were negligent; a comparison of the facts by the jury was necessary and, by their finding, the cases seem to hold that the Court was bound." It is urged that there is no evidence of negligence on the part of the defendants in the construction of the platform and that the trial Judge should have so directed the jury. The evidence shews that the plaintiff was aware of the presence of the train at least a few feet before he reached it, and that in order effectually to stop his progress he threw himself to the ground backwards. There can be little doubt that on level ground such a course would be effectual to accomplish the purpose intended, and it seems to be that it was a reasonable, if indeed not the only reasonable, conclusion for the jury to reach that the plaintiff slipped or rolled on the sloping platform so that his foot came under the wheel of the car. The dangerous character of the platform might, perhaps, not be evidence of negligence, for danger is not necessarily evidence of negligence, since danger is a necessary accompaniment of many conditions; but if the platform could be conveniently made without the accompaniment of danger, then its presence would be negligence, and apart from any oral testimony the plan submitted shewing the platform, which appears on the appeal book as Exhibit B., shews that it could have easily been constructed with an almost imperceptible slope or with the slope in another part of it so as not to be immediately adjoining the track, and in either case the element of danger would have been absent.

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Apart from this, however, other circumstances existed from which the jury might find negligence, as pointed out in the judgment of this Court on the first appeal.

At the second trial defendants' counsel objected to the jury panel on the ground that the provisions of the Ordinance respecting juries being ch. 28 of the Consolidated Ordinances, 1898, had not been complied with. It is provided by section 20 of that Ordinance that it shall come into force immediately from and after the repeal of sections 71 and 88 of the North-West Territories Act. The Revised Statutes of Canada which came into force on the 31st day of January last, repealed the whole of the North-West Territories Act, and it is contended that thereby the Ordinance immediately became effective. Chapter 44 of the Statutes of Canada, 1907, however, limits the extent of the above repeal and excepts its operation from the Provinces of Saskatchewan and Alberta, and is declared to be retroactive and in effect from the 31st day of January last. Without considering the question from any other point of view, I am of opinion that the effect of chapter 44 is to annul the repeal of the North-West Territories Act as far as the Provinces of Saskatchewan and Alberta are concerned, and that therefore the Ordinance did not apply to this jury and the objection is therefore not sustainable.

It is further urged that the damages are excessive and that the increase from $3,500, the amount of the verdict in the former trial, to $6,500 on the present one, shews that the verdict is perverse and wrong. It is, of course, apparent to anyone that there can be no accurate measure of damages for personal injuries and, in the absence of any statutory rules fixing a basis by which they are to be determined, no two persons would be likely to fix exactly the same amount; but I am of opinion that a jury of men in the same or a similar station of life to that of the injured person is as good a body as can be obtained to measure the damages sustained if it acts honestly. It is, of course, quite true that there has at times been a tendency on the part of juries not to deal honestly with corporations and particularly

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with railway companies in such matters, but I am of opinion that it cannot be said that the sum of $6,500 for the loss of a foot by a strong young man just starting to earn a livelihood can be said to be so excessive as to warrant interference by the Court. It is a matter of common knowledge that, particularly in the last few years of commercial prosperity, such sums have been made in comparatively short periods of time in occupations for which this young man would have been fitted but from which he would be debarred by the loss of a foot. On this point the case of *Blain* v. *C. P. R.*, 5 O.L.R. 334, 2 Can. Ry. Cas. 69, 85; *Canadian Pacific R.W. Co.* v. *Blain*, 34 S.C.R. 74, and 36 S.C.R. 159, 3 Can. Ry. Cas. 143, 4 Can. Ry. Cas. 429, is instructive. In that case the plaintiff was assaulted by a passenger in the defendant's train under circumstances making the defendants liable. On the first trial he was given a verdict of $3,500, but the Supreme Court of Canada ordered a new trial unless the plaintiff would accept $1,000, being of opinion that of two assaults considered by the jury the defendants were not liable for the first. A new trial was had, when the jury gave a verdict of $2,500 for the first assault and $1,500 for the second, or $4,000 in all. On appeal the Supreme Court of Canada refused to disturb this verdict. As far as the reports shew, there was no permanent injury as the result of the assault, and the railway was only liable because it neglected its duty to protect the plaintiff. Comparing the verdict in that case with the present one, I can see no good reason why the discretion of the jury in this case should be interfered with.

For the foregoing reasons and those given on the former appeal, I am of opinion that the appeal should be dismissed with costs.

(*See next case.*)

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STATION ROAD—SIGNALS—NEGLIGENCE.

CANADA.] [SUPREME COURT.

CANADIAN PACIFIC R.W. CO. v. HANSEN.

(40 *S.C.R.* 194.)

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

Operation of railway—Yard siding—Sloping station platform—Private passage—Dangerous way—Negligence—Procedure at trial—Misdirection—Objections to charge to jury—Practice.

Where, on a specific objection to his charge, the trial Judge recalled the jury and directed them as requested, the contention that the directions thus given were erroneous should not be entertained on an appeal.

Present: Sir Charles Fitzpatrick, C.J., and Davies, Idington and Duff, JJ.

APPEAL from the judgment of the Supreme Court of the North-West Territories affirming the judgment entered by Stuart, J., on the verdict of the jury awarding the plaintiff $6,500 with costs.

The action was to recover damages for injuries sustained by the plaintiff at Red Deer Station, on the Calgary and Edmonton Branch of the railway of the defendants, caused, as alleged, by the dangerous manner in which the approaches to the station were constructed and the imprudence of the company in shunting a train on a yard siding close to the platform without proper warning by a man placed at the end of the train.

At the first trial the jury assessed the damages at $3,500, and, on this verdict, a judgment was ordered to be entered from which the company appealed to the Court in banc and obtained an order for a new trial, 4 W.L.R. 385. The judgment entered at the second trial was affirmed by the judgment now appealed from.

The principal contentions on the appeal were, that the only negligence relied on in the Courts below was the character of a sloping platform at which the accident complained of occurred

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and, as to which, there was no evidence of faulty or negligent construction; that the case came directly within the authority of *Crafter* v. *The Metropolitan R.W. Co.*, L.R. 1 C.P. 300; that the injuries sustained resulted from the fault of the plaintiff in failing to look out for the train when he was running towards the yard-tracks and aware that the usual operations of shunting were being carried on; that the case should have been withdrawn from the jury on account of contributory negligence by the plaintiff, and that the Judge's charge to the jury was misleading and had not been properly corrected after objections had been taken by counsel and the jury re-called for further directions by the Judge.

The appeal was argued on March 5, and 6, 1908.

W. Nesbitt, K.C., and *Bennett,* K.C., for the appellants.
J. Travers Lewis, K.C., and *Smellie,* for the respondent.

May 5, 1908. THE CHIEF JUSTICE:—I am of opinion that this appeal should be dismissed with costs.

DAVIES, J.:—With much hesitation I have acceded to the view of the majority of the Court dismissing this appeal.

I had formed a strong impression that the charge of the trial Judge to the jury was misleading and was not properly corrected after objections had been taken to it by counsel.

I thought that a new trial should be granted on the ground I have stated, but, under the circumstances, will not press my views to the extent of formally dissenting.

IDINGTON, J.:—I concur in the opinion stated by Mr. Justice Duff.

DUFF, J.:—The only difficulty I have felt in this appeal concerns the question of contributory negligence, and I have come to the conclusion that the evidence does not so conclusively establish a case of contributory negligence as would have justified the withdrawal of the case from the jury.

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The complaint that the learned trial Judge misdirected the jury raises a topic which I think the defendants are not entitled to agitate in this Court.

It is a forensic principle of some importance that a litigant is bound by the way in which he conducts his case at the trial, may not play fast and loose. In this case a specific objection to the charge of the trial Judge was taken at the trial, and the trial Judge was asked to correct his charge on the point in question by giving a specific direction to the jury, and that request was complied with.

In these circumstances it would, I think, be a violation of the principle referred to as well as a departure from the settled course of this Court to give effect at this stage to the contention that the direction thus requested to be given, and thus given, was an erroneous direction.

Appeal dismissed with costs.

Lougheed, Bennett & Co., for the appellants. *J. L. Crawford*, for the respondent.

NOTE.

Leave to appeal from this decision was refused by the Privy Council, July, 1908.

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RAILWAY CROSSING—COLLISION—NEGLIGENCE.

ONTARIO.] [MACMAHON, J.

[COURT OF APPEAL.

McKAY v. WABASH R.W. Co.

(Unreported.)

Railway crossing—Collision between railway trains—Disobedience to orders—Signals—Negligence—Contributory negligence—Railway Act, secs. 277, 278—Lord Campbell's Act.

John McKay, a locomotive engineer in the employ of the Canadian Pacific R.W. Co., was killed in a collision between trains of the Canadian Pacific and defendant railway companies.

An action was brought by his widow against the Wabash Company claiming damages under Lord Campbell's Act.

McKay before attempting to cross brought his train to a full stop, but not at the stop-board, as required by the rules of the railway company and proceeded slowly when the signals indicated the crossing was clear, thus complying with the Railway Act, secs. 277, 278.

The Wabash train on the other hand, without coming to a full stop although the signals were against it, attempted to make the crossing at the speed, according to the jury, at "the diamond" of eight or nine miles an hour.

The real cause of the accident was the reckless disregard of the statute by the defendant's employees in charge of the train.

Held, Meredith, J.A., dissenting, that on the answers of the jury the defendant company was liable in damages for the accident.

APPEAL by the defendants from the judgment of MacMahon, J., from the verdict of the jury in favour of the plaintiff for $10,000.

The action as tried before MacMahon, J., with a jury at St. Thomas on the 22nd and 23rd days of October, 1906.

The accident happened about a mile east of St. Thomas where the Canadian Pacific and the Grand Trunk Railway lines cross on the level. The defendants have running rights over this section of the Grand Trunk Railway between St. Thomas and Niagara Falls.

The questions put to the jury with their answers are set out in the judgment of Moss, C.J.O., *infra*.

The other facts appear in the judgments.

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H. E. Rose, for the appellants.

J. M. Godfrey, for the respondents.

THE appeal was heard before Moss, C.J.O., Osler, Garrow, MacLaren and Meredith, JJ.A., on the 29th day of April, 1907.

For the appellants, it was argued that the verdict was against the evidence and the weight of evidence; that proper questions were not left to the jury; that the Judge's charge to the jury was misleading; that the defendant was entitled to judgment on the ground that McKay was guilty of a breach of section 278 of the Railway Act and apart from the Railway Act altogether, was guilty of contributory negligence; and that the damages are excessive.

It was established that the Wabash train did not stop at the distance semaphore or at any point between that semaphore and the intersection of the two tracks, but it had nearly stopped at the said intersection and could have been brought to a standstill in a car length, although the jury found that its speed was eight or nine miles an hour. The train of the Canadian Pacific Railway Company was not brought to a full stop at the stop-board or at any point between the distance semaphore and the diamond as required by section 278 of the Railway Act.

The trial Judge refused to submit any question to the jury with reference to any stopping place other than the distance semaphore or any general question as to contributory negligence. It was claimed that if McKay had stopped at the stop-board, even if there was a breach of the statutory duty he could not have developed a speed of twelve miles an hour and thus could have had his train under control so as to have avoided instead of contributing to the accident.

The weight of evidence was against the deceased having brought his train to a full stop at the distance semaphore or any other place before reaching the diamond.

The damages are clearly excessive. McKay earned about $125 a month if he worked continuously without holidays and there is evidence to shew that he did not.

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Taking into account that McKay was comparatively a young man, and that his employment was unusually hazardous, it seems unfair to base any estimate on the actuarial tables as to the probable continuance of life. The trial Judge refused to deduct the endowment policy from the amount of the damages as is done in the case of an accident policy.

For the respondents, it was argued that it was beyond question that as the train of the Canadian Pacific Railway Company approached the diamond, the distance semaphore was lowered; the train came to a full stop as required by sections 277 and 278 of the Railway Act; the home semaphore was lowered; the train attempted to make the crossing and was run into by a train of the Wabash Company.

The appellants do not attempt to say that they were not negligent in the engineer of their train attempting to cross without stopping anywhere as required by the Railway Act. They rely on two defences:—

1. That the Canadian Pacific train did not stop at the distance semaphore. The jury found, although there was conflict, that the weight of evidence supported the contention that the train stopped at the point in question. A Court of Appeal cannot balance evidence, but must accept the finding of the jury.

2. In answer to the second contention that the Canadian Pacific train should have stopped at the stop-board, it is submitted that in this case we are bound by the Railway Act, the provisions of which have been fully complied with by the stop at the distance semaphore. There is not evidence that if the stop had been made at the stop-board, the accident would have been avoided. The present value of the payment of $100 per month by the deceased to his wife compiled by an actuary was shewn to be a sum very much in excess of the verdict, and a Court of Appeal should not interfere with the functions of a jury in awarding damages. With regard to the insurance, the jury were charged in the terms of the judgment of the Privy Council in *Jennings* v. *Grand Trunk R.W. Co.*, 13 App. Cas. 800.

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June 28, 1907. Moss, C.J.O:—John McKay was an engine-driver in the employ of the Canadian Pacific Railway Company. On 24th August, 1906, a collision occurred between a train belonging to the defendants and a train belonging to the Canadian Pacific Railway Company, of which the deceased was the engine-driver, resulting in his death. The accident occurred at a place near the city of St. Thomas where one of the lines of the Grand Trunk Railway Company, over which the defendants have running privileges, and the line of the Canadian Pacific Railway Company cross each other at rail level. In the vicinity of the crossing in question the direction of the line of the Grand Trunk is approximately east and west, and that of the Canadian Pacific is approximately north and south.

On the morning of the accident the defendant's train was proceeding westerly from the Niagara River to St. Thomas, and the Canadian Pacific train was proceeding from St. Thomas northerly to Woodstock. By sec. 225 of the Railway Act, 3 Edw. VII. ch. 58 (now sec. 277 of R.S.C. ch. 37) it was enacted that "no train or engine or electric car shall pass over any crossing where two main lines of railway or the main tracks of any branch lines cross each other at rail level . . . until a proper signal has been received by the conductor or engineer in charge of such train or engine, from a competent person or watchman in charge of such crossing, that the way is clear." And by sec. 226 (now sec. 278 of R.S.C. 1906, ch. 37) it was enacted that "every engine, train, or electric car shall before it passes over any such crossing as in the last preceding section mentioned be brought to a full stop: provided that whenever there is in use at any such crossing an interlocking switch and signal system or other device which . . . renders it safe. . . ."

In this case there was no interlocking system or device, and the proviso does not apply. On the Canadian Pacific line there were two semaphores, called distance semaphores, situate one on each side of the crossing, the one nearest to St. Thomas being about 815 feet to the south of the crossing, and the one to the north being about 936 feet from the crossing; about 415 feet

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from the semaphore to the south of and about 400 feet from the crossing was a post with a board with the word "stop" painted upon it, spoken of in the evidence as the "stop post." Almost immediately at the point where the two railway lines cross was a semaphore called the home semaphore.

On the Grand Trunk line were also two distance semaphores protecting the crossing, one on each side of it, that to the east being about 893 feet from the crossing, that to the west being about 703 feet from the crossing. No stop posts intervened between these semaphores and the crossing. All these semaphores were operated by a signal man in the employ of the Grand Trunk Railway Company. It is his duty to see that no train on either line passes the crossing unless the line is clear, and the distance semaphores upon the other line are set against the movement of trains upon it. When the distance semaphore is lowered on either line, a train may move forward towards the crossing but it may not pass it unless the home signal is lowered. When a train on one line is passing the crossing, the distance and home semaphores are set against trains on the other line. The plaintiff in this action alleged that while the Canadian Pacific train of which the deceased was the engine-driver was passing the crossing, the signals being in its favour, the defendants' employees in charge of the defendants' train, disregarding the distance and home semaphores which were set against them, neglected and failed to bring the train to a stop, and on the contrary negligently allowed it to proceed, thereby coming into collision with the Canadian Pacific train and causing the injuries to the deceased which resulted in his death.

The defendants pleaded the general issue, vouching sec. 242 of the Railway Act, 1903, 3 Edw. VII. ch. 58, and at the trial contended, among other defences, that the death of the deceased was caused by or was owing to a breach on his part of sec. 226 of the Act and of a rule of the Canadian Pacific Railway Company requiring him to stop his train at the stop post, and also that he was guilty of contributory negligence apart from the Act and the Canadian Pacific Railway Company's rule.

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The evidence at the trial shewed that the Canadian Pacific train left the St. Thomas station at 8.15 in the forenoon, and, after some delay or partial stoppage at a semaphore called the yard limit signal, it proceeded towards the distance semaphore situate 815 feet south of the crossing in question.

There was a conflict of testimony as to whether the train came to a full stop at this semaphore. The conductor, fireman and brakesman of the train swore positively that the train stopped, and they were corroborated to some extent by the express messenger, who was in the baggage car. Against this there was the testimony of two male and two female passengers on the train and two lads who were engaged in digging and gathering potatoes in a field between the two lines of railway at a point to the west of and between 400 and 500 feet distant from the distance semaphore.

The two men swore that the train made no stop between St. Thomas and the crossing, but one of them remembered hearing a whistle for the distance semaphore, and that the steam was shut off and the brakes applied as the train reached it. The testimony of the young ladies went no further than that they could not recollect the train stopping. The two lads stated that the train did not stop, but one of them admitted that as it approached the distance semaphore it slowed down until it was going just as slowly as a train could go and still be moving. Hare, the signal man at the crossing who lowered the distance and home semaphores, shewing that the line was open for the Canadian Pacific train to proceed, said that looking up the line towards the train he thought it was moving. All this evidence for the defence, which, together with a few additional incidental circumstances, was fully presented to the jury by the trial Judge, was not sufficient to displace the plain definite testimony of the train hands and the express messenger, all of whom were more or less directly interested in the movements of the train.

There was on the whole a fair preponderance of testimony

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that the train did stop at the distance semaphore. Upon the lowering of the semaphores the train proceeded towards the crossing, the line being clear according to the signals. At the same time both the distance and home semaphores on the line used by the defendants' trains were plainly set against the approach of any train to the crossing. And the evidence is conclusive that there was an entire disregard, by those in charge of the defendants' train, which came into collision with the Canadian Pacific train, of the statutory injunction. The train running at a high rate of speed passed the distance semaphore without stopping, and the two trains came together at the crossing. Considerable time was devoted to endeavouring to ascertain whether the defendants' train struck the Canadian Pacific train or was struck by it. In view of the negligence of the defendants' employees, which was clearly established against the defendants it does not appear to be very material one way or the other, except perhaps as bearing to some slight extent on the defendants' contention with regard to the alleged breach by the deceased of the Canadian Pacific Railway Company's rules.

There was no doubt that the deceased met his death through the trains coming into collision, and the question was, to whose negligence was the accident attributable? There were proved at the trial and put in copies of the rules of the Canadian Pacific Railway Company and of certain circulars issued to the men. Among the rules are the following:—

"98 (*c*) Unless there is an interlocking plant in operation, trains must stop and receive proceed signals from signalman before passing over a drawbridge or a railway crossing at grade. The back view of a fixed signal at such a point does not govern the movement of the train."

"98 (*d*) Passenger trains must not exceed a speed of 12 miles, and other trains a speed of 8 miles, per hour, over railway crossings at grade and drawbridges."

Among the directions contained in a circular issued on 1st May, 1905, the following occurs: "The following instructions

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concerning standard stop post and slow posts are issued for the guidance of all concerned: Standard stop posts placed 400 feet from railway crossings at grade and drawbridges where interlocking plants are not in operation are indications of points at which trains are required to come to a stop and be governed by rule (98 *c*)."

At the conclusion of the plaintiff's case and again at the close of the whole case, a motion was made on behalf of the defendants to dismiss the action, on the ground that it appeared that the deceased did not stop the Canadian Pacific train before coming to the crossing, and it was submitted that, even if the train was stopped at the distance semaphore, the rules and directions of the circular required the deceased again to stop his train at the stop post, and his breach of duty in that regard was the cause of the accident.

The trial Judge overruled the motion, and the case was submitted to the jury on questions, which, with the answers thereto, are as follows:—

"(1) Did the Canadian Pacific train stop at the semaphore before proceeding to cross the Grand Trunk track at the diamond? A. Yes.

"(2) Was the distance semaphore signal and the semaphore signal at the diamond lowered for the Canadian Pacific train to cross the Grand Trunk track? A. Yes.

"(3) At what speed did the Canadian Pacific train travel from the distance semaphore to the Grand Trunk Crossing? A. 10 to 12 miles per hour.

"(4) Was the distance semaphore signal on the Grand Trunk line and the semaphore signal at the crossing against the Wabash train as it came down the grade? A. Yes.

"(5) At what rate of speed was the Wabash train running at the distance semaphore? A. At the distance semaphore 45, and 8 to 9 miles per hour at the diamond.

"(6) Did the engine of the Wabash train strike the Canadian Pacific engine or did the Canadian Pacific engine strike the Wabash train. A. Wabash struck the Canadian Pacific engine.

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"(7) Was the injury to John McKay from which he died caused by such collision? A. Yes.

"(8) If the Wabash train had stopped at the semaphore, would the collision have occurred? A. No.

"(9) If the defendants the Wabash Railroad Company are liable, at what sum do you assess the damages? A. Damages $10,000, $5,000 to plaintiff Ada McKay, $3,000 to Royden McKay, $2,000 to Harold McKay."

Judgment was entered for the plaintiff in accordance with these findings.

Upon the appeal it was contended for the defendants: (1) that the findings of the jury were against the evidence and the weight of evidence; (2) that the trial Judge's charge to the jury was inaccurate in its references to the evidence and likely to mislead them; (3) that the deceased was guilty of a breach of sec. 226 of the Railway Act of 1903, or of the rules of the Canadian Pacific Railway Company, or of both, and that there was misdirection on this point; (4) that, apart from that, he was guilty of contributory negligence; and (5) that the damages were excessive.

The first objection was mainly directed to the question whether the Canadian Pacific train stopped at the distance semaphore and of its speed when approaching the crossing. As already stated, the fair preponderance of evidence is in favour of the jury's finding on the question of stopping.

And if it be established that the train did stop, there is abundant evidence that it could not develop a speed of more than 10 to 12 miles an hour in the 815 feet between the semaphore and the crossing.

As to the second objection; notwithstanding the close criticism to which Mr. Rose subjected the charge, nothing objectionable has been made to appear. Nothing was said or omitted to which serious objection can be taken. At the request of the counsel for the defendants, the Judge supplemented his observations to the jury, and made some explanations, in order to make clear the bearing of references which he had made to the testi-

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mony of some of the witnesses, and it was quite open to him to comment to the jury as he did upon the testimony.

Throughout he manifested an earnest desire to instruct the jury fully and fairly as to the issues presented for their decision. And in afterwards considering his charge it is well not to forget Lord Hatherley's observation, which is as appropriate to-day as when made 30 years ago, that it is not fair to criticize every line and letter of a summing up which has been delivered by a Judge in trying a case.

The 3rd and 4th objections are more serious and important, and were quite properly most earnestly pressed on our attention.

The evidence shews that the long distance semaphores protecting the crossing on the line of railway used by the defendants' trains were situate the one to the east 893 feet and the one to the west 703 feet, from the crossing, and that these with the home semaphore at the crossing were the only guards in use. The distance semaphores were the points at which the trains on that line did stop before moving on to the crossing.

It is not improper therefore to conclude that the points at which they were placed were reasonable distances at which trains were to stop in compliance with sec. 226 of the Railway Act. On the Canadian Pacific line the distance semaphore to the south of the crossing was 815 feet, and that to the north was 936 feet from the crossing, and there is no reason for saying that a stop at these points would not be a reasonable compliance with sec. 226. The jury found that the train on which the deceased was did stop at the distance semaphore about 815 feet from the crossing. For what reason should it stop again before making the crossing, provided the signals were in its favour? It is argued that rule 98 (*c*) and the directions of the circular make it obligatory to stop again at the stop post. But they do not say so. Rule 98 (*c*) is nothing more than a paraphrase of the language of sec. 226. It says, as in effect the statute does, that when there is no interlocking system trains must stop and receive a proceed signal from the signalman be-

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fore passing over a railway crossing at grade. The meaning is that trains must stop before attempting to pass the crossing, and they must remain at a standstill; they must not proceed until they receive a proceed signal from the signalman. The signal is the lowering of the semaphores. Both semaphores being lowered, they are at liberty to proceed. The direction of the circular is to be observed in the absence of a stop at the distance semaphores, and of a proceed signal enabling them to proceed from that point of stoppage to the crossing. They are obliged to stop once, but not more than once, if after having stopped they receive a proceed signal. If they have not stopped at the distance semaphores, and receive a proceed signal, the stop posts are indications of points at which they are to stop until they receive a proceed signal under rule 98 (*c*). In that case they are to come to a stop and be governed by the rule. But if, after stopping at the distance semaphore, they receive a proceed signal, there is nothing requiring them to stop again while the proceed signal continues. This reading appears to be in harmony with the practice which prevailed, and affords all the protection which sec. 226 calls for, and that is all that is necessary.

The jury found that the train stopped at the distance semaphore 815 feet from the crossing. It there received a proceed signal from the signalman. The requirements of sec. 226 were thus complied with, and there was no obligation to stop again, unless in the meantime, the home semaphore was turned against it. But that did not happen. The proceed signal was continued. The signalman expected the train to come on and pass the crossing without further delay, and to all appearance there was no reason why it should not come on at the statutory speed and make the crossing. The deceased was guilty of no contravention of the statute or breach of the rules. In acting as he did he was observing the statute, and also abiding by the rules. There was no evidence to go to the jury of contributory negligence in the ordinary sense of the term.

The real cause of the accident was the reckless disregard of

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the statute by the defendants' employees in charge of their train, and the jury have in effect so found, upon evidence which fully justifies their conclusion.

With regard to the damages; at first sight the amount appears large, but the evidence on this branch of the case is fuller and more satisfactory than is commonly found in cases under the Fatal Injuries Act. The deceased was a young man in the prime of life, in good health, vigorous, industrious, and provident. He was in receipt of good wages, with a prospect of improving for some years, and, apart from the dangerous nature of his occupation, likely to continue in their receipt for a good number of years. The jury were cautioned by the trial Judge against accepting the full measure of the actuarial computations as to the loss estimated with reference to the evidence as to the deceased's age, state of health, earning power, and prospects, and it is quite apparent that they took heed of the warning, otherwise their award would have been much greater. They were fully directed as to the basis on which alone the damages were to be estimated, and cautioned to make allowance for nothing but what appeared to be actual pecuniary loss. And finally their attention was pointedly called to the fact of the receipt by the plaintiff Ada McKay of the proceeds of insurance policies to the amount of $4,250 and they were directed to take that fact into consideration and make allowance for it. In these respects the charge followed the rules and principles enunciated in *Jennings* v. *Grand Trunk R.W. Co.*, 13 App. Cas. 800.

Having regard to the whole evidence bearing on this branch of the case, and considering what would have been the deceased's reasonable prospects of life, work, and remuneration, and how far these, if realized, would have conduced to the benefit of his widow and children, it cannot fairly be said that the jury have taken into consideration topics which they ought not to have taken into consideration, or have been influenced by any improper considerations, or have miscalculated, or that the amount they have awarded is at all so out of proportion to the circum-

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stances as shewn by the evidence as to make it proper to interfere with their award.

The appeal should be dismissed with costs.

OSLER, GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A.:—The findings of the jury, except upon the question of damages, cannot rightly be disturbed. It cannot be said that there was no reasonable evidence upon which they could be based. In the conflict of testimony it was within the sole power of the jury to find where the truth lay; and the mere facts, that they accepted the testimony of the more or less interested witnesses, those of the train's crew, and rejected the testimony of the disinterested witnesses, passengers and onlookers, and that it is somewhat unusual for jurors to give credit to such interested witnesses when given in favour of railway companies in actions brought against them by strangers, are not enough to indicate misconduct or mistake, on the part of the jury, such as would justify the setting aside of their verdict; nor is the fact, if it be one, that few Judges would have reached the same conclusion.

But whether the findings of the jury are sufficient to support the judgment for the plaintiff, directed to be entered upon them, is a question for the Court alone; the jury are not concerned in it. And, in this respect, the one substantial question is, whether the finding that the train stopped at the distant semaphore was a finding of compliance with the requirements of the Railway Act, section 278, that every train, before it passes over any such crossing as that in question, shall be brought to a full stop.

The semaphore was about 800 feet from the crossing, and the place indicated by the "stop" post, as the place of stopping, was just half way between the two points—about 400 feet from the crossing. The semaphore in question was called the "distant" semaphore, and there was a second one at, or quite near to, the crossing, called the "home" semaphore.

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It is unfortunate that so little evidence was given as to the purposes and uses of these semaphores and stop posts, and that, apart from the rules of the railway companies, one is left to the exercise of his common sense, almost unaided, respecting them.

We start, however, with these two important facts, that the man in respect of whose death this action is brought, and who was the engineman of one of the trains in question, was prohibited by Act of Parliament from passing over the crossing in question (1) until a proper signal had been received by him that the way was clear, and (2) without also bringing his train to a full stop before passing over.

Recognizing the danger of accidents, and the possible terrible nature of them, from just such things as happened in this case, Parliament has thus tried to make assurance doubly sure. Not content with the care of the watchman, or other person, controlling the signals, at the crossing, it has placed a separate and independent responsibility on those in charge of engines and trains, and required a separate and independent act to be done by them. So that, notwithstanding the person in charge of the train has been duly signalled to cross, it is his bounden duty also to bring his train to a full stop before passing over the other railway. Whatever may be the effect of this duty, whether in many cases to create only unnecessary delay and cause additional inconvenience and anxiety to the person in charge of the crossing or any one else, it is imperative and must be obeyed. The learned trial Judge seems, for the moment at all events, to have lost sight of this duty, when he said, in the presence of the jury, that if the jury found that the engineman got the signal to go on, and his train was struck by the other train, and his death caused thereby, the liability was clear.

In addition to these statutable duties, it was the duty of the engineman to his masters, under their formal rules for the guidance of their servants applicable to this case, to stop and receive proceed signal before passing over a railway crossing at grade, and to observe and act upon the rule respecting standard stop posts placed 400 feet from railway crossing at grade,

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which, it states, are indications of points at which trains are required to come to a stop before passing over such crossings. Stopping at the distance semaphore was obviously not a compliance with this rule.

Some things are quite plain; it is quite plain that, although all the signals invited the engineman to cross, it was yet his statutable duty to bring his train to a full stop before passing over, and that, under his master's rules, it was his duty to them to stop at the "stop" post.

The signals were in his favour, but he did not stop at the stop post, but went on and came in collision with the other train. The jury have found that he did stop at the "distant" semaphore: and the trial Judge ruled that that was a sufficient compliance with the statute, and that it relieved him from any imputation of negligence in crossing. Were these rulings right? Were not the questions determined in them at least questions of fact for the jury? In the earlier stage of the trial the learned Judge was of opinion that they were and stated very plainly that they would be left to the jury, but he subsequently changed his mind and said, "I think if they stopped at the semaphore they complied with it. However if I am wrong you can take the benefit of it." And to the jury he said, "I am holding that if the engine and train did stop at the semaphore that the statute has been complied with."

In my opinion that question was one of fact, under all the circumstances of the case, and therefore a question for the jury, and not a question of law for the Court.

It is quite obvious that many stops, which might possibly come within the literal meaning of the words, would not be a compliance with the requirement of the enactment; for instance a stop a day or a week before, or, as a matter of distance, at the station next before reaching the crossing, or a mile before reaching it. The very words of the Act savour of proximity—"before it passes over any such crossing." And the purpose of the enactment must be regarded; and an interpretation which will best aid it ought to be adopted.

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That 800 feet away was not a safe place to stop, under certain circumstances, the destruction done in this case has emphatically proved. That it was not the proper place to stop, in the opinion of those probably most concerned, the engineman's masters, was continually evidenced by the stop post and the rule respecting it—the point at which "trains are *required* to stop," before crossing.

That there ought to be a fixed place for stopping, that the place of stopping should not be fixed by the convenience or whim of each engineman, is obvious: and that each stopping place should be just where those in charge of the engine could best safeguard the trains against the danger of it is also obvious. Near enough to make them to see, and hear, as much as possible, but not so near as to cause danger of overrunning the crossing by reason of a "greasy" rail, or some mishap which might prevent stopping in time.

The point chosen seems as well calculated as any could be to answer these purposes. Nearer would bring the engine to a better position for hearing and seeing, but might not leave enough room, in case the air brakes failed to act, to bring the train to a stop by other means, or to prevent other unintentional over-running the crossing through any other cause avoidable or unavoidable.

Nearly one-sixth of a mile away could hardly be deemed a proper stopping-place. Quite out of hearing distance of the man at the crossing; in bad weather often quite out of sight of the crossing; under no circumstances affording anything like a reasonable opportunity for those in charge of the engine to make assurance doubly sure, in many circumstances affording nothing like an opportunity, of any kind, for so doing; it seems very difficult to understand how stopping at such a distance could in any case be reasonably deemed a full stop before passing over such a crossing, such as the Railway Act makes imperative; much less such a stop as would justify a ruling by the Court that it was such a stop and a withdrawal of the question from the jury. And what if the distant semaphore for any cause

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happened to be twice or thrice 800 feet away? How and when does it cease to be a question for the jury and become a question of law for the Court?

But in addition to all this there is the absolute necessity for safety's sake to stop, or proceed with great caution, when the semaphore is set against an on-coming train, as it was at first in this case. It is an unequivocal intimation of danger, whether indicated by the upward arm by day or the red light by night; and quite as much so as a red flag would be. The stop which was made at this distant semaphore was therefore a stop at that danger signal, and not a stop at the crossing. Again the working rules of the engineman's masters shew this: "Where a semaphore is used a 'red light or the arm at a horizontal position means 'stop.'" Rule 26 (*b*);

> "An approaching train finding a yard limit signal displayed at 'stop' must stop outside of it and sound whistle signal 14 (p). The train will, unless otherwise directed, then move ahead cautiously, (preceded by a flagman when, either on account of curvature or weather or other conditions, the track cannot be seen to be clear) expecting to find the track occupied or the switches wrong, and prepared to stop at once, until its rear is inside of the yard limit signal. Should any portion of the train remain outside of the signal, it must be immediately protected as prescribed by rule 99." Rule 98(*b*);
>
> "Unless there is an interlocking plant in operation trains must stop and receive proceed signal from signalman before passing over a drawbridge or a railway crossing at grade. The back view of a fixed signal at such a point does not govern the movement of a train." Rule 98 (*c*).

And under the heading *Interlocking* at pages 63-4: "*Distant signal*—A fixed signal in connection with the home signal, to regulate the approach thereto." And in the table respecting distant signals, it is stated that the signal of the horizontal arm or yellow light will be displayed when the home signal is at

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stop,—that is horizontal arm or red light—and that under such circumstances enginemen and trainmen must proceed with caution to the home signal—that, as used in the rules, it is a caution signal. Then rule 661 provides that "trains or engines must be run to but not beyond a signal indicating stop" and rule 635 provides that "if a train or engine over-runs a stop signal, the fact, with the number of train or engine, must be reported to the superintendent."

The rules therefore plainly required two stops, one by reason of the danger signal at the distant semaphore, and the other, under the rule before quoted, at the crossing stop post.

Those rules though binding between master and servant, and though a breach of them would prevent a recovery by the servant from the master in such a case as this, and would also justify a discharge of the servant by the master, are not binding between the parties to this action on the question of compliance with the provisions of the enactment, or negligence irrespective of it, but are evidence upon which a jury might act in either respect, and the more so in view of the practice which they established, and which all the enginemen knew and, doubtless, generally complied with.

But it is asked what use for the distant semaphore if not to indicate a proper place for stopping before passing over the crossing? Common knowledge points clearly to at least two necessary purposes. In the first place, it is the mark indicating the near approach to the crossing, so that brakes may be tested if necessary and applied when necessary, so as to comply with the statute, and the working rules, as to stopping before crossing, and the rate of speed when crossing. It is to be remembered that trains pass in the night as well as the day, so that the least informed cannot but see the need for a semaphore at a very considerable distance from the crossing. Again, if two trains were approaching the crossing upon the same road in the same direction, the one in front, stopped between the

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two semaphores, would, with the distant semaphore set against the other, be safe from being run into by it.

In my opinion the questions asked and answered by the jury were not sufficient for the determination of the question of contributory negligence. There were questions which the defendants desired to have left to the jury, and which, in my opinion, should have been submitted to them, namely: Did the engineman bring his train to a full stop, as required by the Act, before passing over the crossing? If not, might he, by doing so, have avoided his injury? Might the engineman, by the exercise of any other ordinary care, have avoided his injury, Such questions not being submitted to the jury, and the questions which were submitted being insufficient for the determination of the right of the parties, there was a mistrial, and the verdict and judgment should be set aside and a new trial had. As a minor point it may be mentioned that there is no finding that the home semaphore was set in favour of the Canadian Pacific Railway train when it started again after stopping at the distant semaphore, and upon the whole evidence, that is, at least, doubtful, so that there is not even a finding that the train stopped anywhere until it got both signals to go on.

But if the question be one for the Court and not for the jury, the trial Judge, in my opinion, erred in considering the stop at the distant semaphore relieved the engineman from any imputation of contributory negligence, that the proper ruling should have been that, at least, he was guilty of an infraction of the statutable injunction to stop, and that if he had stopped, as the Act required, the accident which happened would have been avoided, and that, therefore, the plaintiffs cannot recover in this action. However, for the Court to undertake to determine such questions seems to me a usurpation of the functions of the jury, as well as an undertaking for which the Court must be quite incompetent, in the absence of evidence from those competent to testify upon such questions.

No matter how many others may think otherwise, I cannot but decline to join in that which seems to me a rendering nuga-

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tory, by adjudication, of a clear and important provision of Parliament for the safety of life and property in the working of railways. To decide as a matter of law that a stop at a distant semaphore merely until the signals indicated "go on," is a compliance with the Act, is surely tantamount to deciding that it is not necessary to stop at all if on approaching the signals they indicate go on; and in either case is to do away with one of the Parliamentary safeguards of a very dangerous place, as well as to encourage engine and train men in a loose interpretation of the rules for their guidance, and a lack of caution in their own conduct, irrespective of rules. If in a place of such danger there be any sort of doubt whether one or two stops be required, their interpretation should be in favour of safety, not looseness and danger. And it is to be borne in mind that we are not merely giving a suffering widow and children a fortune; we are deciding practically, so far as this Court can, the same question in regard to all other claims which may be made in respect of this accident, and all other like accidents.

Upon the other question, that of damages, they are in my opinion so greatly excessive as to surely indicate some misapprehension by the jury of their duties in assessing them, or else the imposition by them of heavy exemplary or punitive damages by reason of the conduct of defendants' servants in (as appears from the evidence in this case) approaching a crossing in disregard of the statute and rules as well as of the signals, but which damages are of course inapplicable to such a case as this. A misapprehension might easily have arisen from the evidence adduced, and the little that was said upon the subject of the means by which they might be best estimated. The widow testified to the receipt of $100 a month from her husband out of his earning of possibly $125 a month, when working constantly overtime. An actuary testified that the value of an annuity of $100 a month, based upon interest at 3½ per centum per annum, for the probable duration, according to the mortality tables, of the joint lives of husband and wife, would be about $18,000. The damages assessed were $10,000 and the plaintiffs have also

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the benefit of insurance upon the life of the husband and father to the extent of $4,250. So that the net pecuniary result of the death is that they come in for a fortune of $14,250, quite a large fortune for persons in their position in life.

In regard to the insurance money, it is proper to mention the fact that if the annual premiums upon the policies were treated as the $100 a month was, the result would be probably a considerable loss, rather than the gain of the $4,250, which has been the result of the death, and so the whole of these moneys should be deducted from the actual total pecuniary loss.

So far as the notes of the proceedings at the trial disclose the facts, there is nothing to shew that it was brought to the minds of the jury that the $100 a month, which the adult plaintiff received, was received for, and expended by her in, the support of the family. That substantially she and the children gained from it only their support. That largely it was expended in support of the man who is now dead. Nor that the adult plaintiff gave valuable consideration for all the benefit she got from it, her services as housekeeper, cook, housemaid, chambermaid and charwoman, probably services which she can now employ for her own pecuniary benefit, and services which command in these days a man's wages. These two things would probably at the least have reduced the $100 a month more than 50 per centum. Nor were the possibilities of the woman marrying again, to equal, if not greater, pecuniary advantage, a thing improbable, indeed one may fairly say that they are very probable if she retain the fortune I have already referred to. I have seen it somewhere said that this is a subject which the jury cannot properly consider. But why not? If she marry again, and her second husband gives her $200 a month, is it not a gain of one hundred per centum, all other things being equal, in the only sense in which she is entitled to any damages, a pecuniary sense? Looked at therefore from the heartless, the purely money sense, there may be a profit instead of a loss; whilst looked at from a heart-moving sense a second marriage

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must be, in the anticipation of the widow at all events, some consolation if not a full compensation.

Before her husband's death the wife had to labour hard and long. Now, with interest even at five per centum on the $14,250, she will have more than twice as much as will keep her and her children in idleness; more than twice as much as very many labouring men in this country have during the best years of their lives earned, and yet have brought up families and acquired homes of their own.

If the husband and father had lived, the prospects were a continuation of the hard work for the wife and mother, and for the children such work as they were able to do at home, and a public school education until able to be put to work to earn their own living—probably at the ages of 12 to 15 years. Now they all have a fortune enough to live in idleness all their lives long without making any inroad upon the $14,250 at all. Surely that is very much more than a reasonable compensation for their pecuniary loss only.

The damages awarded are extremely large, at least four or five times more than, I think, the average in such cases as this, I mean including the insurance moneys; and, consistently, with the cases in this Court, cannot but be considered very excessive: see *Renwick* v. *Galt, Preston, and Hespeler Street R.W. Co.*, 11 O.L.R. 158, and in appeal, 12 O.L.R. 35, 5 Can. Ry. Cas. 108, 376. On this ground also there should, in my opinion, be a new trial.

(*See next case.*)

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RAILWAY CROSSING—COLLISION—NEGLIGENCE.

CANADA.] [SUPREME COURT.

WABASH R.W. CO. v. MCKAY.

(40 *S.C.R.* 251.)

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway—Collision—Stop at crossing—Statutory rule—Company's rule—Contributory negligence—R.S.C. 1906, *ch.* 37, *sec.* 278.

A train of the Wabash Railroad Co. and one of the C.P.R. Co. approached a highway crossing at obtuse angles. The former did not, as required by sec. 278 of the Railway Act, come to a full stop; the latter did at a semaphore nearly 900 feet from the crossing and receiving the proper signal proceeded without stopping again at a "stop post" some 400 feet nearer where a rule of the company required trains to stop. The trains collided and the engineer of the C.P. Ry. Co. was killed. In an action by his widow:

Held, that the failure of the engineer to stop the second time was not contributory negligence which prevented the recovery of damages for the loss of plaintiff's husband caused by the admitted negligence of defendants.

Present: Sir Charles Fitzpatrick, C.J., and Davies, Idington, Maclennan and Duff, JJ.

APPEAL from a decision of the Court of Appeal for Ontario affirming the verdict at the trial in favour of the plaintiff.

A collision occurred between trains of the Wabash Railroad Co. and the Canadian Pacific Railway Co. respectively, at a crossing about a mile from St. Thomas, Ont., and the engineer of the C. P. R. train was killed. At the trial of an action by his widow, on behalf of herself and children, she obtained a verdict against the Wabash Co. for $10,000, which was affirmed by the Court of Appeal. On appeal by the company to the Supreme Court of Canada it was admitted that the defendant company was guilty of negligence in not coming to a full stop before approaching the crossing as required by section 278 of the Railway Act and the only question raised was whether or not the deceased engineer was guilty of contributory negligence because, having come to a full stop at a semaphore about 900 feet from

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the crossing he did not stop a second time at a "stop post" some 400 feet further on as required by the rules of his company.

The rules as to the "stop post" are the following:—

"The following instructions concerning Standard Stop Posts and Slow Posts are issued for the guidance of all concerned: Standard Stop Posts placed 400 feet from Railway Crossings at grade and drawbridges where interlocking plants are not in operation are indications of points at which trains are required to come to a stop and be governed by rule 98(*c*)."

Rule 98(*c*), referred to in the circular reads as follows:—

"Unless there is an interlocking plant in operation, trains must stop and receive proceed signal from signalman before passing over a drawbridge or a railway crossing at grade."

The appeal was argued on March 19, 1908.

Rose, for the appellant. A railway company is liable for consequences of an employee's disobedience of rules. *Canadian Pacific R.W. Co.* v. *Lawson*, Cout. Dig. 12, 17; Labatt on Master and Servant, p. 941, sec. 363.

The amount of the indemnity policy should have been deducted from the verdict. *Hicks* v. *Newport, Abergavenny & Hereford R.W. Co.*, 4 B. & S. 403n. Approved in *Bradburn* v. *Great Western R.W. Co.*, L.R. 10 Ex. 1.

Robinette, K.C., and *Godfrey*, for the respondent.

May 5, 1908. THE CHIEF JUSTICE:—I am of opinion that this appeal should be dismissed with costs.

DAVIES, J.:—I concur for the reasons stated by Mr. Justice Maclennan.

IDINGTON, J.:—I concur for the reasons stated by Mr. Justice Duff.

MACLENNAN, J.:—The plaintiff is the widow of John McKay, an engineer of a Canadian Pacific Railway passenger train, who was killed in a collision between his train and a

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train of the appellant company, at a level crossing near St. Thomas, Ont., and she sued for damages for his death. At the trial the plaintiff obtained a verdict and judgment for $10,000, which was affirmed by the Court of Appeal, and this appeal is from that judgment.

Before the accident the trains were approaching each other at an angle of 122° 55′, the train of the deceased on an up-grade, and that of the appellants on a heavy down-grade.

Section 298 of the Railway Act enacts that every train shall, before it passes over any such crossing . . . be brought to a full stop.

The crossing is guarded by five semaphore signals, all operated by a man stationed at the crossing, where one of those signals is placed. The other signals, called distance semaphores, are placed at varying distances, about 800 feet from the crossing, two on each line, one on each of the four directions of the lines from the crossing.

The variation in the distance of those signals apparently depends on the grade of the approach to the crossing. The signal on the side from which the train of the deceased was approaching being 815 feet, and that on the opposite side 936 feet from the crossing, and that on the appellants' line, on the side from which their train was approaching being 893 feet, and on the opposite side 703 feet from the crossing.

I think it is evident that these distance signals were intended by the respective companies to insure compliance with the section of the Railway Act above referred to, and to indicate the points on each line at which the full stop required by the statute is to be made before the train passes the crossing.

But, besides these semaphore signals, the Canadian Pacific Railway Company has placed a fixed post, about 400 feet from the crossing, market Stop. It is a fixed signal, always speaking, not capable, like the others, of being opened or closed, and the appellants have no such additional signals on their line.

What then is the purpose and significance of this post? That

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is explained by rules of the company, 98(*c*) and 98(*d*), and an instruction issued to its trainmen.

These rules are as follows:—

98(*c*) Unless there is an interlocking plant in operation, trains must stop, and receive proceed signals from signal-men, before passing over . . . a railway crossing at grade.

98(*d*) Passenger trains must not exceed a speed of twelve miles, and other trains a speed of eight miles, per hour, over railway crossings at grade.

And the instruction is as follows:—

Standard stop posts, placed 400 feet from railway crossings at grade . . . , where interlocking plants are not in operation, are indications of points at which trains are required to come to a stop, and be governed by rule 98(*c*).

Reading the statute and the rules and the instruction together, I think the stop post is placed as an additional caution, and to ensure the full stop which the statute makes imperative, in case, for any reason, a train did not stop at the distance signal, and as indicating a point beyond which no train should proceed without coming to a stop.

The distance signals must be intended for the same purpose by both companies, that is, as signals for the stop required by the statute. The appellant company had no other, and there can be no reason suggested for two stops before crossing.

The jury found, as they were warranted in doing upon the evidence, although there was some evidence the other way, that the deceased's train did stop at the distance semaphore; that he received a proceed signal from that semaphore, and also from the one at the crossing, and that his speed, at the crossing, was from ten to twelve miles an hour. They also found that the speed of the appellants' train, at its distance semaphore, was forty-five miles an hour, and, at the moment of the collision, eight to nine miles an hour, and that the appellants' engine was the one which struck the other.

It was not contended before us that the appellants were not guilty of negligence, which caused the accident, and the con-

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tention was that the deceased was guilty of contributory negligence, in not stopping at the stop post.

In my opinion it is clear that, having stopped at the distance semaphore and having received a proceed signal from that, and also from the one at the crossing, and having approached the crossing at a speed not exceeding ten or twelve miles an hour, the deceased was not guilty of any negligence.

I think the appeal should be dismissed with costs.

DUFF, J.:—It seems to me to be clear that disobedience of an order such as that relied upon by the defendants cannot be regarded as, *per se*, a breach of the statute or of the statutory rule. The duty of the deceased, McKay, under the statute was neither more nor less than the duty of the company which employed him; and the duty of the company cannot, I think, be measured by the terms of the directions they may give to the persons whom they place in charge of their trains. The statute, in other words, cannot be said to prescribe one standard of duty for the Canadian Pacific Railway Company and another for the defendants. Neither do I think the question whether, in bringing the train to a stop at the semaphore, McKay did make a "full stop" in compliance with the statute, involves any question of fact which the learned Judge was bound to submit to the jury. On that head the sole question for them to pass upon seems to me to have been that which the learned trial Judge left to them, namely, whether in fact the train was brought to a full stop; and the legal result of the finding on that point, taken together with the undisputed facts is, I think, that the statute was observed.

Then, was there any evidence of contributory negligence in fact on the part of McKay which could properly have been submitted to the jury? I think there was none.

The direction referred to seems to be at best ambiguous; and reasonably open to a construction which would sanction the course which the jury found McKay actually took.

I should think it not open to dispute that the existence of an

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ambiguous instruction reasonably susceptible of a construction sanctioning a given course of conduct could not alone be sufficient evidence to support a finding that such conduct is negligent conduct. Evidence shewing that the instruction although open to such a construction was in practice acted upon in a different sense might, perhaps, alter the case. But we have nothing of the kind here. There is not the slightest evidence that McKay's conduct was not in accordance with the practice under the instruction; on the contrary the only evidence touching the point is to the opposite effect.

I would dismiss the appeal.

Appeal dismissed with costs.

H. E. Rose, for the appellants.
Robinette, Godfrey & Phelan, for the respondents.

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CONSTITUTIONAL LAW—CONTRACTING OUT.

[PRIVY COUNCIL.]

GRAND TRUNK R.W. CO. v. ATTORNEY-GENERAL FOR CANADA.

[(1907) *A.C.* 65.]

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canadian Statute, 4 Edw. VII. ch. 31—Power of Dominion Parliament—B.N.A. Act, 1867, sec. 92, sub-sec. 13.

Held, that the Dominion Parliament is competent to enact sec. 1 of Canadian Statute, 4 Edw. VII. ch. 31, which prohibits "contracting out" on the part of railway companies within the jurisdiction of the Dominion Parliament from the liability to pay damages for personal injury to their servants.

That section is *intra vires* the Dominion as being a law ancillary to through railway legislation, notwithstanding that it affects civil rights which, under the British North America Act, 1867, sec. 92, sub-sec. 13, are the subject of provincial legislation.

The appeal was argued July 13, 17, 1906.

APPEAL from a judgment of the Supreme Court given on May 15, 1905, in the matter of a reference by His Excellency the Governor-General in Council as to the competency of the Dominion Parliament to enact the provisions contained in sec. 1 of 4 Edw. VII. ch. 31, being "An Act to amend the Railway Act, 1903."

This Act dealt solely with railway companies within the jurisdiction or legislative power or control of Parliament. The provisions in question are to the effect stated in their Lordships' judgment.

The Supreme Court (Nesbitt, J., dissenting) held that the section was within the competency of the Dominion Parliament, Nesbitt, J., holding that the Act was *ultra vires* as one passed to interfere with contract rights, and that it had no real relation to the operation and management of railways.

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Lafleur, K.C., contended that the Act was *ultra vires,* since the exclusive jurisdiction to enact laws in respect to "property and civil rights" is vested in the Provincial Legislature: see British North America Act, 1867, sec. 91, and sec. 92, sub-sec. 13. The enactment in question is in no sense railway legislation, but assumes to regulate and control the power to enter into contracts covered by section 92, sub-section 13. It affects railways and their employees no doubt, but it does so in reference to matters exclusively within the ambit of provincial legislation. The mere fact that a company is incorporated by the Dominion does not empower the Dominion Parliament to trench upon provincial rights. He referred to section 94 of the Act of 1867; *Cushing* v. *Dupuy* (1880), 5 App. Cas. 409; *Tennant* v. *Union Bank of Canada* (1894), A.C. 31; *Attorney-General for Ontario* v. *Attorney-General for Canada* (1894), A.C. 189; *Hodge* v. *The Queen* (1885), 9 App. Cas. 117; *Canadian Pacific R.W. Co.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (1899), A.C. 367.

Sir E. Carson, K.C., and *Newcombe,* K.C., for the respondent, contended that the subject of the Act in question was within the legislative authority of the Dominion Parliament: see section 91, sub-section 29, and section 92, of the Act of 1867. That Parliament has the exclusive power of authorizing such railways as those in question, and has necessarily the power of prescribing the conditions on which the companies authorized to construct or operate them shall exercise the rights conferred on them. That Parliament has legislated for the purpose of relieving companies subject to its legislative authority of liability, and can equally legislate to impose liability. If the province has also the same power its legislation may be and has been, superseded. They referred to section 239 of the general Railway Act; *Cushing* v. *Dupuy,* 5 App. Cas. 409; *Tennant* v. *Union Bank of Canada* (1894), A.C. 31.

Lafleur, K.C., replied.

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November 5, 1906. The judgment of their Lordships* was delivered by

LORD DUNEDIN:—The question in this appeal is as to the competency of the Dominion Parliament to enact the provisions contained in section 1 of 4 Edw. VII. ch. 31, of the statutes of Canada. These provisions may be generally described as a prohibition against any "contracting out" on the part of railway companies within the jurisdiction of the Dominion Parliament from the liability to pay damage for personal injury to their servants.

It is not disputed that, in the partition of duties effected by the British North America Act, 1867, between the provincial and the Dominion Legislature, the making of laws for through railways is entrusted to the Dominion.

The point, therefore, comes to be within a very narrow compass. The respondent maintains, and the Supreme Court has upheld his contention, that this is truly railway legislation. The appellants maintain that, under the guise of railway legislation, it is truly legislation as to civil rights, and, as such, under section 92, sub-section 13, of the British North America Act, appropriate to the province.

The construction of the provisions of the British North America Act has been frequently before their Lordships. It does not seem necessary to recapitulate the decisions. But a comparison of two cases decided in the year 1894, viz., *Attorney-General for Ontario* v. *Attorney-General for Canada* (1894), A.C. 189, and *Tennant* v. *Union Bank of Canada* (1894), A.C. 31, seems to establish these two propositions: First, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires*, if the field is clear; and, secondly, that if the field is not clear, and in such a domain the two legislations met, then the Dominion legislation must prevail.

*Lord Macnaghten, Lord Dunedin, Lord Atkinson, Sir Arthur Wilson, and Sir Alfred Wills.

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Accordingly, the true question in the present case does not seem to turn upon the question whether this law deals with a civil right—which may be conceded—but whether this law is truly ancillary to railway legislation.

It seems to their Lordships that, inasmuch as these railway corporations are the mere creatures of the Dominion Legislature —which is admitted—it cannot be considered out of the way that the Parliament which calls them into existence should prescribe the terms which were to regulate the relations of the employees to the corporation. It is true, that in so doing, it does touch what may be described as the civil rights of those employees. But this is inevitable, and, indeed, seems much less violent in such case where the rights, such as they are, are so to speak, all *intra familiam*, than in the numerous cases which may be figured where the civil rights of outsiders may be affected. As examples may be cited provisions relating to expropriation of land, conditions to be read into contracts of carriage, and alterations upon the common law of carriers.

In the factum of the appellants it is (*inter alia*) set forth that the law in question might "Prove very injurious to the proper maintenance and operation of the railway. It would tend to negligence on the part of employees, and other results of an injurious character to the public service and the safety of the travelling public would necessarily result from such a far-reaching statute."

This argument is really conclusive against the appellants. Of the merits of the policy their Lordships cannot be judges. But if the appellants' factum properly describe its scope, then it is indeed plain that it is properly ancillary to through railway legislation.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeal. There will be no order as to costs.

Solicitors for appellants: *Batten, Proffitt & Scott.*
Solicitors for respondent: *Charles Russell & Co.*

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END OF VOLUME VII.

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DIGEST OF CASES.

AGREEMENT.

Maintenance of Farm Crossing — Rights of Landowners — Approval of Board to Same.]—*See* FARM CROSSINGS, 1.

APPEAL.

Privy Council—Cross Appeal —Special Leave—Order Granted Nunc Pro Tunc—New Trial Set Aside.]—*See* NEW TRIAL, 2.

ARBITRATION.

Additional Land—Compensation—Interest—Powers of Board — Varying Order — Contractual Relationship.]—*See* EXPROPRIATION, 2.

Award Set Aside — Arbitrators Acting as Mediators — Terms of Submission Exceeded.] —*See* EXPROPRIATION, 3.

AWARD.

Set Aside—Arbitrators Acting as Mediators—Terms of Submission Exceeded.]—*See* EXPROPRIATION, 3.

BOARD.

Jurisdiction — Railway Crossings — Approval of Location Plans—Construction on Highway—Leave of the Board and Municipality — Priority — Protective Appliances — Apportionment of Cost—Railway Act, ch. 37, *R.S.C.* 1906, *secs.* 16, 159, *subsec.* 2, 172, 174, 175, 176, 227, 233, 235, 237 — *Railway Act,* 1903, *sec.* 186—6 *Edw. VII. ch.* 184 *(C.)*—*R.S.O.*, 1897, *ch.* 209—23 *Vict. ch.* 96—7 *Edw. VII. ch.* 37 *(O.).*] — Where in a railway company's original Act of incorporation the construction of its railway along a highway, except under a by-law of the proper municipal council is expressly prohibited and the prohibition is repeated in the Act declaring the company's railway to be a work for the general advantage of Canada, the Board has power under the Railway Act, R.S.C., ch. 37, sec. 26, to prohibit the company from maintaining or using its railway upon the public highway, if constructed thereon without due authority; but

Semble, the general jurisdiction conferred upon the Board by section 26 apart from special circumstances does not extend to the prohibition of placing rails upon or along public highways merely because the leave of the Board has not been given. Such unauthorized acts are not usu-

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ally done in contravention of the Railway Act, and being breaches of the general law forbidding the obstruction of highways are not within the jurisdiction of the Board.

An order of the Board approving location plans of a railway does not give authority to construct or operate the railway upon or across a public highway.

The railway of the Windsor Company was constructed along a public highway without the necessary authority of the municipality and the Board. The consent of the municipality or municipalities was afterwards obtained, but not the requisite leave of the Board. The Board, however, granted leave to the Windsor Company to cross the Canadian Pacific Ry. Co.'s line upon the highway and afterwards the Essex Company, with its location plan properly sanctioned by the Board, and having the leave of the Board to cross the highway on the line of that location, applied to have the railway of the Windsor Company removed from the highway or to be allowed to cross it at the expense of the former, and to have the orders sanctioning the location plans of the Windsor Company and giving that company leave to cross the line of the Canadian Pacific Ry. Co. set aside, the Essex Company claiming a right of seniority because the construction of the Windsor Company's railway on the highway was unauthorized.

Held, 1. That while the Board had jurisdiction to require the removal of the Windsor Company's rails from the highway at the point where the Essex Company obtained leave to cross, no absolute right of priority was acquired by priority of sanction of location plans, or of leave to cross the highway, as the two railways were constructed almost simultaneously, and the application was refused by the Board in the fair exercise of its discretion, the maintenance and operation of the Windsor Company's line along the highway was authorized, and leave was given to the Essex Company to cross the lines of the Windsor Company and the Canadian Pacific Ry. Co., the cost of maintenance and operation of the protective appliances at the crossings being divided equally between the two companies.

2. That the Essex Company had no status *for the purpose of its application to cross the line of the Windsor Company* to question the legality of the location of the latter's line upon the highway. *Essex Terminal Ry. Co.* v. *Windsor, etc., Ry. Co.*, 109.

Additional Land Required for Railway — Compensation — Interest — Varying Order—Con-

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tractual Relationship.]—*See* EXPROPRIATION, 2.

Maintenance of Farm Crossing — Agreement — Rights of Land Owners.] — *See* FARM CROSSING, 1.

Electric Railway — Construction on Highway—Deviation — Order Authorizing—Filing New Plans.]—*See* HIGHWAY.

Protection of Crossing—Contribution to Cost—Liabilty of Municipality — Jurisdiction.]—*See* HIGHWAY CROSSINGS, 1, 2.

Crossing at Highway—Invitation to Public—Injury to Person Crossing Track—Fences at Crossing.]—*See* NEGLIGENCE, 2.

CARRIERS.

Carriage of Goods — Loss of Boxes Shipped — Condition of Contract—Necessity for Notice of Loss.]—One of the conditions of a railway way-bill was that there shall be "no claim for damage for loss of, or detention of, or injury or damage to, any goods for which the company is accountable, unless and until notice in writing and the particulars of the claim of said loss, damage, or detention, are given to the station freight agent at or nearest to the place of delivery within thirty-six hours after the goods in respect of which said claim is made, or such portion of them as are not lost are delivered."

Two boxes of blankets shipped by the plaintiff were re-shipped by the railway to the original place of shipment, and an advice note of their arrival sent to the plaintiff, which stated that there was "one box short":—

Held, that under the terms of the condition the box could not be said to be "lost," and notice in writing by the plaintiff to the defendants, within the thirty-six hours of the receipt of the advice note of the loss of the box, was not essential to entitle the plaintiff to recover its value. *Sheppard* v. *Canadian Pacific R.W. Co.*, 374.

CARRIERS OF PASSENGERS.

Special Passenger Rates — Contract for—Standard Passenger Tariff not Filed—Validity.]—*See* TARIFFS, 1.

CASES.

Becker v. *Canadian Pacific R.W. Co.*, 7 Can. Ry. Cas. 29, followed, p. 355.

Bourassa v. *Canadian Pacific R..W Co.*, 7 Can. Ry. Cas. 41, followed, p. 355.

Branch Lines, In Re, 36 S.C.R. 42, followed, p. 299.

Canadian Pacific R.W. Co. v. *Boisseau,* 32 S.C.R. 424, followed, p. 401.

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Canadian Pacific R.W. Co. v. *Notre Dame* (1899), A.C. 367, followed, p. 177.

Canadian Pacific R.W. Co. and County & Township of York, 1 Can. Ry. Cas. 36, 47, discussed, pp, 73, 274.

Carlill v. *Carbolic Smoke Ball Co.* (1893), 1 Q.B. 256, followed, p. 258.

Carruthers v. *Canadian Pacific R.W. Co.,* 6 Can. Ry. Cas. 19, followed, p. 17.

Dolsen, Re, 13 P.R. 84, followed, p. 71.

Grand Trunk R.W. Co. v. *Kingston,* 8 Ex. C.R. 349, followed, p. 73.

Groves v. *Wimborne* (1898), 2 Q.B. 402, followed, p. 198.

Laning v. *A.T. & S.F.R. Co.,* 12 I.C.C.R. 479, followed, p. 303.

Lees v. *Ottawa & New York R.W. Co.,* 31 O.R. 567, followed, p. 263.

Leonard v. *C.M. & St. P. R.W. Co.,* 12 I.C.C.R. 492, followed, p. 303.

London Interswitching Case, Re, 6 Can. Ry. Cas. 327, followed, p. 303.

Madden v. *Nelson & Fort Sheppard R.W. Co.* (1899), A.C. 636, referred to, p. 177.

McArthur v. *Northern & Pacific Junction R.W. Co.,* 15 O.R. 733, 17 A.R. 86, followed, p. 156.

Morgan v. *Metropolitan R.W. Co.,* L.R. 4 C.P. 97, followed, p. 258.

Murray v. *Canadian Pacific R.W. Co.,* 7 West. L.R. 50, followed, p. 355.

Phair v. *Canadian Northern R.W. Co.,* 5 Can. Ry. Cas. 334, referred to, p. 17.

Toronto v. *Grand Trunk R.W. Co.,* 5 Can. Ry. Cas. 138, followed, p. 274.

CATTLE AT LARGE.

1. *Accident—Injury to Cattle —Crossing — Negligence—Special Agreement — Liability — Tenant — Railway Act,* 1903 —3 *Edw. VII. ch.* 58, *sec.* 237, *sub-sec.* 4 (*D.*).]—Section 237, sub-section 4, of the Canada Railway Act, 1903, 3 Edw. VII. ch. 58 (D.), enacts that: "When any cattle or other animals at large upon the highway or otherwise, get upon the property of the company and are killed or injured by a train, the owner of such animal so killed or injured shall be entitled to recover the amount of such loss or injury against the company . . . unless the company . . establishes that such animal got at large through the negligence . . . of the owner or his agent. . . ":—

Held, that, on the proper construction, the reference in the above section is not to animals getting upon the railway from an adjoining enclosure, but only to animals at large upon the highway or otherwise at large; and that it can have no reference

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to animals escaped from an adjoining field where, apart from any defect in railway fencing, they were properly enclosed.

The action was brought for the loss of cattle of the plaintiff which escaped from his enclosure and got upon the railway and were killed. The plaintiff was a lessee from the owner for one year, and his animals got on the railway owing to a defective gate at the farm crossing. Prior to the plaintiff's lease the owner had agreed with the defendants that he might put in the crossing provided he did it himself and would keep his gates up, and that the defendants should not be responsible for anything he might lose on that crossing:

Held, that this agreement exonerated the defendants, the plaintiff being bound by it whether he knew it or not when he took his lease.

Held, also, *per* Riddell, J., that the plaintiff's contributory negligence disentitled him to recover. It was proved by evidence properly admitted that the plaintiff had agreed with the owner to keep up the gates, and while this could not be relied upon by the defendants as an estoppel, or, in itself a perfect defence by way of contract, it was cogent evidence of contributory negligence, for the plaintiff knew it was his duty to keep the gate in repair and he knew that the gate was not a safe gate, yet he deliberately put his animals into the field. *Yeates* v. *Grand Trunk R.W. Co.*, 4.

2. *Liability to Fence—Lands not Enclosed—Cattle at Large—Sections* 254 *and* 294, *Railway Act, R.S.C., ch.* 37—*Section* 199, *Railway Act,* 1903.]—The plaintiff's cattle passed from his land (lots 41 and 42) on to the defendants' right of way, and westerly thereon to and across lots 43 and 44, and from off lot 44 again on to the right of way, where they were killed by a passing train.

The railway was not fenced across these lots, nor for many miles on either side of the plaintiff's lands. South of the railway the plaintiff's land was improved and settled, and was enclosed in the following manner: A colonization road ran southwesterly through the plaintiff's land and was fenced on each side; there was a fence on the east side of lot 41 from the colonization road to the right of way, and on the west side of lot 42 there was a fence from the colonization road to a point within 70 rods of the right of way, of which 70 rods about 50 rods was a "slash" of upturned trees, whose roots had been burned and then blown down and left just as they fell; for 20 rods south from the right of way there was no fence or other obstruction, but a ditch had been

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dug by the defendants upon their right of way south of the roadbed extending westward on defendants' land to the north of plaintiff's land and part of McMullen's (the adjoining owner) land, until it turned southward for a distance of more than 20 rods to a creek on lot 44, for the purpose of carrying off the water from defendants' land. The remainder of plaintiff's land south of the colonization road was in a state of nature and used for pasture except a small enclosed portion. There were no fences on McMullen's land other than that referred to on the west side of plaintiff's land. The plaintiff claimed the right, under an agreement, with McMullen to pasture his cattle on lots 43 and 44.

Held, 1. That neither the plaintiff's nor McMullen's land was so enclosed as to make the defendants liable to erect a fence between their right of way and these lands as required by section 254 of the Railway Act, R.S.C. ch. 37, and section 199 of the Railway Act, 1903. *Phair* v. *Canadian Northern R.W. Co.*, 5 Can. Ry. Cas. 334, referred to.

2. That the plaintiff's cattle having the right to be on McMullen's land were not at large within the meaning of sub-section 4 of section 294 of the Railway Act, R.S.C. ch. 37, and the defendants were not liable for their loss, but even if the cattle were considered to be at large, the plaintiff could not recover.

Carruthers v. *Canadian Pacific R.W. Co.*, 6 Can. Ry. Cas., at p. 19, followed. *Biddeson* v. *Canadian Northern R.W. Co.*, 17.

3. *Negligence — Railway Act,* 1903—3 *Edw. VII. ch.* 58, *sec.* 237 — *Animals at Large — Construction of Statute—Words and Terms—"At Large upon the Highway or Otherwise"—Fencing of Railway—Trespass from Lands not Belonging to Owner.*] —C.'s horses strayed from his enclosed pasture situated beside a highway which ran parrallel to the company's railway, entered a neighbour's field adjacent thereto, passed thence upon the track through an opening in the fence which had not been provided with a gate by the company, and were killed by a train. There was no person in charge of the animals, nor was there evidence that they got at large through any negligence or wilful act attributable to C.:—

Held, affirming the judgment appealed from (16 Man. R. 323), that under the provision of the fourth sub-section of section 237 of the Railway Act, 1903, the company was liable in damages for the loss sustained notwithstanding that the animals had got upon the track while at large in a place other than a highway

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intersected by the railway. *Canadian Pacific R.W. Co.* v. *Carruthers*, 23.

4. *Animal Killed on Track—Liability of Railway — Railway Act*, 1903, *sec.* 237, *sub-sec.* 4—*Animals at Large Through Negligence of Owner — Absence of Evidence that Horses Killed by a Train.*] — Plaintiff's horses were found by defendants' section foreman on their right of way about a quarter of a mile from a highway crossing. The fences were in good repair and so were the cattle guards at the crossing prior to a snow storm which filled them up. The horses were killed after the snow storm.

There was no evidence as to how they came to their death nor any evidence of external violence. It was shewn that the horses were put in pasture at a distance from the plaintiff's residence without any one being left in charge and in such a position that they might easily have escaped:—

Held, that the plaintiff could not recover as the horses were at large through his negligence or wilful act or omission. *Becker* v. *Canadian Pacific R.W. Co.*, 29.

5. *Railway Act*, 1903 (*Dominion*), *sec.* 237, *sub-sec.* 4—"*Animals at Large upon the Highway or Otherwise,*" *Meaning of*—*Sec.* 199 — *Pleading* — *Amendment.*]—Plaintiff's animals were set at large to pasture in the open country, and were killed at a place where the company was not bound to fence:—

Held, that he could not invoke the aid of section 237, subsection 4 of the Railway Act, 1903.

Decision of Forin, Co. J., affirmed, Martin, J., dissenting. *McDaniel* v. *Canadian Pacific Pacific R.W. Co.*, 34.

6. *Liability for Tort—Act of Parliament of Canada—Railway Act—Loss of Cattle Straying on Railways—Liability of Railway Companies—Negligence—Wilful Act or Omission of Owner of Cattle.*]—*Held*, under sub-section 4 of section 237 of the Railway Act, 1903, 3 Edw. VII. ch. 58, an Act of the Parliament of Canada, which provides that railway companies shall be liable for the loss of cattle killed on their roads except when it is proved that such cattle "got at large through the negligence or wilful act or omission of the owner or his agent" no liability whatever is incurred by the company for contributory negligence or otherwise when the case falls within the exception. *Bourassa* v. *Canadian Pacific R.W. Co.*, 41.

7. *Animal Killed on Track—Negligence — Fences — Farm Crossing — Liability — Adjoining Owners — British Columbia Law.*]—Action for damages for a mare killed on the defendant's railway track while the mare

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was running at large, having presumably got upon the railway track at the farm crossing of a man named Morton at which there were cattle guards but no gates:—

Held, Martin, J., dissenting, that in the absence of evidence that the mare was unlawfully at large at Morton's crossing, the railway company was negligent in not maintaining gates at Morton's crossing and that, according to the law to be administered in British Columbia, she was "not wrongfully on the railway" and the owner was entitled to recover.

Held, further, that the fact of farm crossings being provided with cattle guards instead of gates at the request of Morton the owner did not relieve the defendant from its statutory duty under the Railway Act to maintain gates at this point.

Decision of Irving, J., at the trial reversed. *Coen* v. *New Westminster Southern R.W. Co.,* 60.

8. *Railway Act, R.S.C.,* 1906, *ch.* 37, *sec.* 254, *sub-sec.* 4—"*Locality,*" *Meaning of—Obligation of Railway to Fence—Animals Killed by Train.*]—Plaintiff's animals were killed on defendants' track, the right of way of which passed in front of his land. There was no fence erected on this portion of land, either by the railway company or plaintiff. The north end of the plaintiff's ranch was within 800 yards of the municipal limits of Fernie. There were about two acres of the ranch with a frontage of 450 feet on the right of way, and about 200 feet off was an enclosure used as a goat pen, about 20 by 30 feet. There was also a potato patch of about three-quarters of an acre, and a moveable fence separating this patch from a grassy portion. This, together with a piece of fencing along a waggon road, but not reaching the right of way by some 225 feet, was the only fencing on the ranch. There was evidence of scattered places in the vicinity, some being fenced and others not, but with unfenced and unoccupied land intervening:—

Held, by the Full Court, reversing the holding of Wilson, Co. J. (Clement, J., dissenting), that as the land in question *per se* could not be classed as a settled or inclosed locality, there was no obligation on the company to fence its right of way in the absence of an order from the Board of Railway Commissioners to do so; and that their contiguity to the limits of an incorporated town did not constitute the lands a portion of the settled locality of such town.

Having regard to the powers given the Board of Railway Commissioners by section 254 of the Railway Act, and particu-

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larly the language of sub-section 4, the word "locality" must be construed without reference to the proximity of town limits. *Cortese* v. *Canadian Pacific R.W. Co.*, 345.

9. *Animals Killed on Track—Railway Act*, 1903, *sec.* 237—*Animals "at Large Through Negligence of Owner" — Evidence — "Otherwise."*]—Where horses had been placed by the plaintiff in a corral bounded on the south and west by a fence, on the east by a creek and not closed in, in any way on the north, the creek being frozen over so that the horses could pass over it, it was held that there was a wilful omission or negligence on the part of the owner within the meaning of the statute in leaving horses in such a place at night and that the owner, therefore, could not recover against the railway company.

The statute does not intend that railway companies should be insurers against any accident which may occur by reason of their trains. Some duty is cast upon the owners of all animals that are likely to be placed in danger by reason of the trains and they must take reasonable precautions to prevent them getting at large, so that accidents may not happen to them. *Murray* v. *Canadian Pacific R.W. Co.*, 351.

10. *Liability for Animals Killed on Track — Animals at Large Through Negligence of Owner — Obligation to Fence — Railway Act, R.S.C.* 1906, *ch.* 37, *secs.* 254, 294, 427.] — 1. When it proved that animals killed by a train of a railway company had been allowed to go at large on a public road through the negligence or wilful act or omission of the owner or his agent, and, in consequence thereof, got upon the right of way through a defect in the railway fence, sub-section 4 of section 237 of the Railway Act, 1903 (sec. 294 of ch. 37 of R.S.C. 1906) protects the company from any claim for damages, although the company had failed to observe the requirement of section 199 (now 254) by neglecting to keep the fence along the right of way in proper repair.

Murray v. *Canadian Pacific R.W. Co.* (1907), 7 West. L.R. 50; *Becker* v. *Canadian Pacific R.W. Co.* (1906), 7 Can. Ry. Cas. 29, and *Bourassa* v. *Canadian Pacific R.W. Co.* (1906), 7 Can. Ry. Cas. 41, followed.

2. Said section 237 deals completely with the question of animals at large getting upon the railway track and being killed or injured, and, therefore, section 294 (now 427) being only of general application, cannot be interpreted so as to make the company liable in a case in

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which, by section 237, it is expressly relieved from liability. *Clayton* v. *Canadian Northern R.W. Co.*, 355.

COMMON EMPLOYMENT.

Negligence—Breach of Statutory Duty—Fatal Injuries Act.] —*See* WORKMEN'S COMPENSATION ACT.

COMPANIES.

Shares — Transfer — Mandamus — Interlocutory Order.]—*See* TRANSFER OF SHARES.

COMPENSATION.

Interest — Additional Land—Powers of Board — Varying Order — Contractual Relationship.]—*See* EXPROPRIATION, 2.

Electric Railway — Construction on Highway — Order of Board — Claim by Adjoining Owner.]—*See* HIGHWAY.

CONDITION LIMITING LIABILITY.

Loss of Baggage Shipped — Notice of Loss—Construction of Contract.]—*See* CARRIERS.

CONSTITUTIONAL LAW.

1. *Legislative Jurisdiction — Application of Statute — "The Prairie Fires Ordinance"—Con. Ord. N.W.T.* (1898) *ch.* 87, *sec.* 2—*N.W.T. Ord.* (1903) *ch.* 25 (*1st sess.*) *and ch.* 30 (*2nd sess.*) —*Works Controlled by Parliament — Operation of Dominion Railway.*]—In so far as they may relate to matters affecting the operation of a railway under the control of the Parliament of Canada, the provisions of section 2, sub-sections (*a*) and (2), of chapter 87, Con. Ord. N.W.T. (1898), as amended by the N.W.T. Ordinances, ch. 25 (1st sess.) and ch. 30 (2nd sess.) of 1903, constitute "railway legislation," strictly so-called, and were beyond the competence of the Legislature of the North-West Territories. *The Canadian Pacific R.W. Co.* v. *The Municipality of Notre Dame de Bonsecours* (1899), A.C. 367, and *Madden* v. *The Nelson and Fort Sheppard R.W. Co.* (1899), A.C. 626, referred to. *Canadian Pacific R.W. Co.* v. *The King*, 176.

2. *Crossings—Railway Act of Canada*, 1888—*Powers of Railway Committee of Privy Council —Protection by Means of Gates and Watchmen—Contribution to Cost of—Municipal Corporation —Highways Constructed Before Railways—Highways not Within Municipality.*] — Until 31st December, 1901, the defendants paid their share of the cost of protecting certain level crossings in and about the City of Toronto pursuit to the order of

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the Railway Committee of the Privy Council dated 8th January, 1891, and then ceased from making further payments.

Held, 1. In the action brought to enforce payment, that the defendants were concluded by the authority of decided cases.

In re Canadian Pacific R.W. Co. and *County & Township of York,* 27 O.R. 559, 25 A.R. 65, 1 Can. Ry. Cas. 36, 47.

City of Toronto v. *Grand Trunk R.W. Co.,* 37 S.C.R. 232, 5 Can. Ry. Cas. 138.

2. That the order of the Railway Committee was valid and binding, until rescinded by the Board of Railway Commissioners. *Canadian Pacific R.W. Co.* v. *City of Toronto,* 274.

3. *British North America Act,* 1867, *sec.* 91, *sub-sec.* 29, *sec.* 92, *sub-sec.* 10(*a*)—*Dominion Railway Act of* 1888, *secs.* 187, *and* 188, *Intra Vires—Interpretation Act* (*R.S.C.* 1886, *ch.* 1) *sec.* 7, *sub-sec.* 2—*Construction—"Person."*]—The Railway Committee of the Privy Council of Canada, by order made under sections 187 and 188 of the Dominion Railway Act (51 Vict. ch. 29), directed certain measures to be taken for safeguarding the respondents' railway, which is a through railway, and for the protection of the public in traversing it at certain level crossings where it passes across public streets at points within or immediately adjoining the boundary of the appellant city, and directed the cost thereof to be borne in equal proportion by the railway and the city.

In a suit by the railway after the execution of works as directed to recover the apportioned amount from the corporation:—

Held, that sections 187 and 188 were *intra vires* of the Dominion Legislature by force of the British North America Act, 1867, sec. 91, sub-sec. 29, and sec. 92, sub-sec. 10(*a*).

Held, also, that, having regard to section 7, sub-section 2, of the Interpretation Act (R.S.C. 1886, ch. 1), "person" in section 188 includes a municipality. *City of Toronto* v. *Canadian Pacific R.W. Co.,* 282.

4. *Canadian Statute,* 4 *Edw. VII. ch.* 31—*Power of Dominion Parliament—B.N.A. Act,* 1867, *sec.* 92, *sub-sec.* 13.]—*Held,* that the Dominion Parliament is competent to enact section 1 of Canadian Statute, 4 Edw. VII. ch. 31, which prohibits "contracting out" on the part of railway companies within the jurisdiction of the Dominion Parliament from the liability to pay damages for personal injury to their servants.

That section is *intra vires* the Dominion as being a law ancillary to through railway legislation, notwithstanding that it

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affects civil rights which, under the British North America Act, 1867, sec. 92, sub-sec. 13, are the subject of provincial legislation. *Grand Trunk R.W. Co.* v. *Attorney-General for Canada*, 472.

Legislation Affecting Railways —Negligence — Fires — Canadian Pacific Railway Company's Charter.]—*See* FIRES, 2.

CONSTRUCTION OF STATUTE.

Repeal—Amendments by Subsequent Legislation — Grand Trunk Railway Company—Passenger Tolls—Third-class Fares.] —*See* TOLLS.

CONTINUOUS ROUTE.

Passenger Tariffs — Through Rates—Joint Tariffs—Competitive and Non-competitive Points.]—*See* TARIFFS, 2.

CONTRIBUTORY NEGLIGENCE.

Cattle Straying — Wilful Act or Omission of Owner—Liability of Railway Company.] — *See* CATTLE AT LARGE, 6.

Cattle Killed on Track—Negligence of Owner—Company not Insurers.] — *See* CATTLE AT LARGE, 9, 10.

Street Railway—Person Leaning Out—Negligence Per Se.]—*See* NEGLIGENCE, 3.

Highway Crossing — Finding of Jury—Nonsuit — Signals.]—*See* NEGLIGENCE, 5, 6.

Question in Issue — Non-disposal of.]—*See* NEW TRIAL, 3.

Signals at Crossing—Conflicting Evidence—Speed of Train Within City Limits.]—*See* SIGNALS AT CROSSING, 1.

COSTS.

Practice — Costs of Application for Warrant of Possession —Railway Act, 1903, *secs.* 193, 217 *and* 219, *sub-sec.* 1.]— Where a railway company under its powers to expropriate land obtained a warrant for possession and the amount awarded the owner in subsequent arbitration proceedings is less than the amount at first offered by the company the costs of obtaining the warrant for possession shall be borne by the owner. *Re Vancouver, Victoria & Eastern R.W. & Nav. Co. and Milsted*, 257.

Tenant for Life—Order Authorizing Conveyance — Infant Remainderman.] — *See* EXPROPRIATION, 1.

Injury to Person Crossing Track — Invitation to Public — Crossing at Highway—Fences.] *See* NEGLIGENCE, 2.

COST OF PROTECTION.

Highway Crossing—Contribution by Municipality—Powers of

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Railway Committee.]—*See* CONSTITUTIONAL LAW, 2, 3.

Highway Crossings — Municipality—Jurisdiction of Board.]—*See* HIGHWAY CROSSINGS, 1, 2.

Double Track — Priority — Senior and Junior Company.]—*See* RAILWAY CROSSING, 1.

DEVIATION.

Electric Railway — Construction on Highway — Deviation from Plans — Order of Board Authorizing — Claim of adjoining Owner.]—*See* HIGHWAYS.

DISCRIMINATION.

East and Westbound Rates—Unjust Discrimination Between Localities—Undue Preference—Similar Parties and Under Similar Conditions—Long and Short Haul—High Cost of Operation and Maintenance of Railway Eastward—Main Line—Natural Dividing Line—51 Vict. ch. 29, sec. 232—60-61 Vict. ch. 5, sec. 1 (D.)—Water Competition.]—The Boards of Trade of British Columbia Pacific Coast cities complained that the rates levied on all classes of goods from Vancouver to interior points in British Columbia and the North-West Territories as far East as Calgary on the main line and to MacLeod on the Crow's Nest line were discriminatory as against them, as compared with the rates on West bound traffic from Winnipeg to the same territory:—

Held, 1. Mr. Commissioner Mills dissenting, that the evidence as to the cost of operation and maintenance upon different sections of the main line shewed that the rates from Pacific Coast points Eastward were really lower than those from Winnipeg Westward, than if they were based upon the proportionate expense, that the natural dividing line, or average points of meeting are as fairly situated, and the Eastward rates lower as compared with similar railway companies in the United States, and that the traffic on the prairie lines being heavier than in British Columbia lower rates can be charged thereon.

2. That low rates to the Pacific Coast are necessary to enable the railway companies to obtain traffic in competition with ocean carriers. Such a practice is distinctly authorized by the Railway Act, and does not involve unjust discrimination, unless the higher rates from Eastern points to interior Western are unjust or unreasonable.

The mere fact that Westbound rates from Winnipeg or any other point to an interior Western point, are less than the rates formed by a combination of the rates from such Eastern points to a Pacific point and from the

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latter to the interior points does not in itself constitute unjust discrimination or undue preference.

3. A mere comparison of distances upon different portions of a railway for the purpose of shewing that higher rates are charged for shorter distances over a line with small business or expensive in construction, maintenance and operation as compared with one with large business or inexpensive in construction, maintenance and operation does not establish a charge of unjust discrimination.

To justify such a charge the nature of the particular lines must be shewn and that there is a material disproportion of rates as against the shorter line after making due allowance for the circumstances above mentioned.

4. When the Act to authorize a subsidy for a railway through the Crow's Nest Pass (60-61 Vict. ch. 5, sec. 1 (D.)) was passed and the railway company agreed in return for such subsidy to charge lower tolls upon certain classes of goods from Fort William and all points East to all points West, the Railway Act of 1888 (51 Vict. ch. 29, sec. 232) then prohibited unjust discrimination between localities, and Parliament should not be considered as having authorized what would, if done otherwise, have produced unjust discrimination between localities, accordingly the rates from Pacific points Eastward should be proportionately reduced upon similar traffic carried under similar circumstances:—

Held, that the complaint should be dismissed, except in so far as it relates to classes of traffic on which reduced rates were given under 60-61 Vict. ch. 5, sec. 1 (D.). *British Columbia Pacific Coast Cities* v. *Canadian Pacific R.W. Co.*, 126.

DISOBEDIENCE TO ORDERS.

Watchmen — Signals — Negligence — Contributory Negligence—Lord Campbell's Act.]—*See* RAILWAY CROSSINGS, 2, 3.

DOMINION PARLIAMENT.

Powers of—Statute Prohibiting Contracting Out.] — *See* CONSTITUTIONAL LAW, 4.

DOUBLE TRACK.

Priority—Cost of Protection —Senior and Junior Company.] —*See* RAILWAY CROSSING, 1.

ELECTRIC RAILWAY.

Construction on Highway—Consent of Municipality — By-laws — Change of Location — Plans and Profiles — Order of

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Board Dispensing With.]—*See* HIGHWAY.

EVIDENCE.

Animals Found on Track—Liability of Railway—"Trains or Engines."]—*See* CATTLE AT LARGE, 4.

Fires — Negligence—Judge's Charge—Verdict—New Trial — Admitting Evidence on Appeal.]—*See* FIRES, 1.

Street Railway—Person Leaning Out—Negligence Per Se.]—*See* NEGLIGENCE, 3.

Onus of Proof—Insulation of Electric Wires—Duty of Employee.]—*See* NEGLIGENCE, 4.

Signals at Crossing—Speed of Train—Negligence — Contributory Negligence.]—See SIGNALS AT CROSSING, 1.

EXPROPRIATION.

1. *Railway — Lands Required for Railway—Infant Remaindermen—Tenant for Life—Order Authorizing Conveyance—Costs —Railway Act, R.S.C.* 1906, *ch.* 37, *secs.* 183, 184.]—Where a widow was entitled to a life estate in certain lands and her infant children to the remainder in fee, and she had made an agreement with a railway company to sell them such part of the lands as they required for their right of way, at a reasonable price, approved by the official guardian on behalf of the infants, an order was made by a Judge under section 184 of the Railway Act, R.S.C. 1906, ch. 37, giving her power to sell lands and the rights of the infants therein, which power, joined to her legal power as tenant for life, would enable her to sell and convey the fee; the purchase money to be paid into Court, and the company to pay the costs.

Re Dolsen (1889), 13 P.R. 84, followed, the sections of the Act as it now stands being substantially the same as in the Act of 1888. *Re Canadian Pacific R.W. Co. and Byrne*, 71.

2. *Taking Additional Land—Arbitration — Compensation — Terms and Conditions—Interest —Powers of Board—Sections* 29, 192, *Railway Act, ch.* 37, *R.S.C.* 1906—*Sections* 139, 153, *Railway Act,* 1903— *Varying Order of the Board—Contractual Relationship.*]—The Board on February 23rd, 1905, made an order authorizing the Grand Trunk Railway Co. to take certain lands in the City of Toronto for a railway passenger station, etc., upon certain terms and conditions: (Burnt District Case, 4 Can. Ry. Cas. 290).

One of the terms and conditions (numbered 7), was that the applicant should pay to the owner, if thereto required by

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notice in writing given to it before the appointment of arbitrators, compensation with interest at 5 per cent. per annum from May 4th, 1904. Arbitrators were appointed on January 23rd, 1906.

On February 4th, 1907, Eckardt applied to the Board for an order to vary clause 7, so as to dispense with or extend the time for giving the said notice or allowing it to be given *nunc pro tunc* or for such further and other order as to the Board might seem proper:—

Held, that the application should be dismissed; the railway company had acquired a vested right to obtain the land upon the statutory terms and the matter had passed out of the hands of the Board. *Eckardt* v. *Grand Trunk R.W. Co.*, 90.

3. *Arbitration—Arbitrators as to Value of Land Expropriated also Appointed Mediators — Award Set Aside — Terms of Submission Exceeded—Railway Act,* 1903, *sec.* 161.]—Where arbitrators were appointed under deeds of submission to value three expropriated lots of ground and the indemnity for damages, it being declared that they should act as mediators (amiables compositeurs) but should be bound to conform to the provisions of section 161 of the Railway Act, 1903, and the award in lieu of valuing the third lot in money ordered that the expropriators should return it in part and construct a road on their own adjoining land, to be maintained by them in perpetuity for the benefit of the parties expropriated:—

Held, that arbitrators who are also appointed mediators cannot disregard their instructions and that the error vitiated the whole award. *Quebec Improvement Co.* v. *Quebec Bridge Co.*, 336.

Warrant of Possession—Cost of.]—*See* COSTS.

FARM CROSSING.

Farm Crossings — Agreement —Maintenance—Rights of Land Owners — Application to Board of Railway Commissioners.]—A railway constructed by the defendants' predecessors in title crossed the plaintiffs' respective farms. In 1854, when the line of railway was being laid down, bridges and an under-pass were constructed by the railway company to enable the owners of the farms to pass from one side of the railway to the other, and were for more than 50 years maintained and used in connection with the plaintiffs' farms, with the knowledge of the defendants and their predecessors in title, without any objection on their part:—

Held, on the evidence, that the bridges and under-pass were pro-

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vided for and enjoyed by the plaintiffs' predecessors in title as part of the agreements or arrangements under which the defendants' predecessors in title acquired their right of way through the lands in question, and the defendants were bound by them. There could be no question of *ultra vires;* the subject matter of the agreements was within the powers and authority of the railway company in dealing for the acquisition of a right of way. The defendants were in the wrong in assuming to alter or reconstruct the bridges and under-pass without the sanction of the Board of Railway Commissioners; and it was for them, and not for the plaintiffs, to apply to the Board.

Judgments of BOYD, C., and MEREDITH, C.J.C.P., affirmed. *McKenzie* v. *Grand Trunk R.W. Co.; Dickie* v. *Grand Trunk R.W. Co.*, 47.

Cattle Guards at—Agreement With Owner—Animals Killed on Track—Adjoining Owner—Negligence.]—*See* CATTLE AT LARGE, 7.

FENCES.

Lands not Enclosed—Cattle at Large — Adjoining Owner.]—*See* CATTLE AT LARGE, 2, 3.

Open Property — Company's Liability to Fence—Tracks.]—*See* CATTLE AT LARGE, 5.

Cattle Straying—Farm Crossing—Adjoining Owner—Law of British Columbia — Agreement with Owner.] — *See* CATTLE AT LARGE, 7.

Lands not Settled or Enclosed —Obligation of Railway to Fence — Definition of "Locality."]—*See* CATTLE AT LARGE, 8.

Liability of Railway — Negligence of Owner—Company not Insurers.] — *See* CATTLE AT LARGE, 9, 10.

Persons Crossing Track — Crossing at Highway—Approval by Board—Invitation to Public.] —*See* NEGLIGENCE, 2.

FIRES.

1. *Operation of Railway—Unnecessary Combustibles Left on Right of Way — Railway Act,* 1903, *secs.* 118(*j*) *and* 239—*R.S.C.* 1906, *ch.* 37, *secs.* 151(*j*) *and* 297 — *Damages by Fire — —Point of Origin—Charge by Judge—Finding by Jury—New Trial—Practice—New Evidence on Appeal—Supreme Court Act, secs.* 51 *and* 73.]—The question for the jury was, whether or not the place of origin of the fire which caused the damages was within the limits of the "right of way" which the defendants were, by the Railway Act, 1903, obliged to keep free from unnecessary combustible matter,

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and their finding was that it did, but the charge of the Judge was calculated to leave the impression that any space where trees had been cut, under the powers conferred by section 118(*j*) of that Act, might be treated as included within the "right of way" and, in effect, made a direction, on issues not raised by the pleadings or at the trial, as to negligent exercise of the privilege conferred by that section:—

Held, that, in consequence of the want of more explicit directions to the jury on the question of law and the misdirection as to the issues, the defendants were entitled to a new trial. The Court refused an application by the respondents, on the hearing of the appeal, for leave to supplement the appeal case by production of plans of the right of way which had not been produced at the trial, as being contrary to the established course of the Court. *Red Mountain R.W. Co.* v. *Blue*, 150.

2. *General and Special Legislation Affecting Railways—Dominion and Provincial — Negligence — Damages Caused by Sparks From Engine—Limitation of Action for Damages—"By Reason of the Construction and Operation of the Railway"—Consolidated Railway Act,* 1879 (*Dominion*), *Railway Act,* 1903 (*Dominion*) — *Canadian Pacific Railway Company's charter—Interpretation Act, R.S.C.* 1906, *ch.* 1.]—In an action for damages caused by sparks from a railway engine, the railway company claimed the benefit of section 27 of the Consolidated Railway Act, 1879, which was incorporated into their charter by Parliament. Said section 27 provides, in part, that all suits for indemnity for any damage or injury sustained by reason of the railway shall be instituted within six months next after the time of such supposed damage sustained:—

Held, on appeal, *per* Hunter, C.J., and Clement, J., that by virtue of section 20 of the Interpretation Act (Dominion), the Railway Act, 1903, applies to the Canadian Pacific Railway.

Per Irving, J.:—The general Railway Act of 1879, notwithstanding its repeal by subsequent general legislation, governs the Canadian Pacific Railway. *Northern Counties Investment Trust* v. *Canadian Pacific R.W. Co.*, 164.

Prairie Fires Ordinance — Constitutionality—Operation of Dominion Railways.]—*See* CONSTITUTIONAL LAW, 1.

Combustibles Left on Right of Way — Negligence — Judge's Charge — Verdict — New Trial —New Evidence on Appeal.]—See FIRES, 1.

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GATES AND WATCHMEN.

Cost of—Contribution to by Municipality—Powers of Railway Committee.]—*See* CONSTITUTIONAL LAW, 2, 3.

Injury to Person Crossing Track — Municipality — Costs — Liability of.] — *See* NEGLIGENCE, 1.

HIGHWAY.

Electric Railway — Construction Along Highway With Consent of Municipaliy—By-laws—Location of the Line and Change Thereof — Filing of Further Plans and Profiles Dispensed With by the Board—Order of the Board Authorizing Deviation—Date of Filing New Plan Subsequent to Date of Board's Order—Damage—Compensation —Road-side Land Owner—Sections 20, 235, *Railway Act, R.S.C. ch.* 37, 1906—*Section* 186, *Railway Act,* 1903.]—On an application by a land owner for an order rescinding an order of the Board allowing an electric railway company to change the location of its line from the centre to the west side of a public highway on the ground that such deviation would injuriously affect his property:—

Held, 1. Refusing the application, that the Board having already sufficient material before it, could authorize such deviation without the filing of further plans and profiles.

2. That the railway in question was one "to be operated as a street railway or tramway" within the meaning of section 235 of the Railway Act and that the Board must either authorize the placing of the railway upon the street in accordance with the terms of the consent of the municipality (that it should be on the west side of the highway), or refuse the authority entirely.

Chief Commissioner: — The construction of the railway would more than offset the damage to the owner's land.

Deputy Chief Commissioner dissenting.

The question of compensation should be decided by the ordinary Courts of justice and rests entirely between the immediate land owner and the municipality.

Commissioner Mills dissenting.

The order should stand only on condition that the land owner is allowed reasonable compensation. *Robertson* v. *Chatham, Wallaceburg & Lake Erie R.W.*, 96.

Railway Crossings on—Leave of Board and Municipality—Jurisdiction — Protective Appliances—Apportionment of Costs.] —*See* BOARD.

Cattle Killed at Crossing—Negligence—Special Agreement —Liability of Tenant.] — *See* CATTLE AT LARGE, 1.

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HIGHWAY CROSSING.

1. *"Municipality or Person Interested"—Jurisdiction of the Board — Protection by Gates — Contribution to Cost of—Railway Act, R.S.C.*, 1906, *ch.* 37, *sec.* 59.]—The Board by its order of December 19th, 1906, made on the application of the village of Cedar Dale directed that the Grand Trunk Ry. Co. should bear the expense, over and above that to which the Oshawa Electric Company was subject, of protecting by gates the crossing of the Grand Trunk Railway by the electric railway on Simcoe Street in the village of Cedar Dale at a point about four hundred feet south of the limits of Oshawa. Counsel for the town of Oshawa supported the application for the order stating that the corporation was interested in the protection being granted, but should not contribute to the expense.

The Grand Trunk Ry. Co. then applied to the Board to vary its order and apportion the cost of such protection equally between the town of Oshawa, the village of Cedar Dale and the applicant on the ground that the town was interested in the matter and the weak financial position of the village should not exempt it:—

Held, 1. That the Board in this case is a court of original jurisdiction and must decide for itself not merely the question of law, but also the question of fact as regards "interest" and also whether, in the exercise of its discretion, the town should contribute to the cost of protecting the crossing.

2. That while as a matter of law there was some evidence of interest on the part of the town, yet as a matter of fact there was no such interest in the circumstances of this particular case and the application should be dismissed, the costs of the village but not of the town to be borne by the Grand Trunk Ry. Co.

Grand Trunk Ry. Co. v. *City of Kingston*, 8 Ex. C.R. 349, 4 Can. Ry. Cas. 102.

In re Canadian Pacific Ry. Co. and County and Township of York, 27 O.R. 539, 25 A.R. 65, 1 Can. Ry. Cas. 36, 47, referred to. *Grand Trunk R.W. Co.* v. *Village of Cedar Dale et al.*, 73.

2. *Construction of Highway Across Railway — Municipality to Bear Cost of Construction and Maintenance—Section* 237, *Railway Act, ch.* 37, *R.S.C.*, 1906.] —At the end of a village street a private level crossing over two lines of railway was allowed to be used for many years by the public for access to a stove foundry across the tracks without any active steps being taken by the railway companies owning them to prevent this prac-

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tice. The land on the village side had been subdivided into lots and built upon across the tracks. This street had been laid out in continuation through farm lands to a public highway.

The railway companies put up warning notices and occasionally closed the gates at each side of their lines thereby preventing any inference of any intention to dedicate this portion of their lines to public use as a highway crossing.

Upon application by such adjoining village municipality for an order directing the railway companies to construct a public highway across their lines at the place in question:—

Held, 1. That the applicant should be granted leave at its own expense to construct and maintain a highway across the railways and the lands of both companies.

2. The multiplication of level crossings is entirely undesirable, but not so undesirable as illegal level crossings and railway companies should either fence off their lines and take steps to prevent the unlawful crossing of their tracks or allow public highways to be placed across them where the public interest demands such a course. *Village of Weston* v. *Canadian Pacific and Grand Trunk R.W. Cos.*, 79.

Protection by Gates and Watchmen—Cost of—Highways not Within the Municipality.]—*See* CONSTITUTIONAL LAW, 2, 3.

Signals at—Finding of Jury — Contributory Negligence — Nonsuit.]—*See* NEGLIGENCE, 5, 6.

Watchman at—Backing Train — Master and Servant.] —*See* NEGLIGENCE, 7.

Horses Killed — Negligence— Contributory Negligence — Conflicting Evidence — Speed of Train Within City Limits.]—*See* SIGNALS AT CROSSING, 1.

INFANT.

Tenant for Life—Conveyance by—Order Authorizing—Lands Required for Railway — Costs.] —*See* EXPROPRIATION, 1.

INTEREST.

Lands Required for Railway — Compensation — Additional Land—Powers of Board.]—*See* EXPROPRIATION, 2.

INTERSWITCHING.

Joint Tariffs — Joint Rates — Through Rates — Traffic.]—*See* TARIFFS, 3.

JOINT TARIFFS.

Passenger Tariffs — Through Rates — Continuous Route — Competitive and Non-competitive Points.]—*See* TARIFFS, 2.

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Double Tracks — Interswitching — Joint Tariffs.] — *See* TARIFFS, 3.

JURISDICTION OF BOARD.

Railway Crossings—Approval of Location Plans—Construction on Highway — Leave of Board and Municipality — Protective Appliances — Cost — Apportionment — Priority.] — *See* BOARD.

JURY.

Objections to Charge — Misdirection — Verdict at Trial.]—*See* NEGLIGENCE, 8.

Misdirection — Objections at Trial.]—*See* NEW TRIAL, 1.

Verdict — Evidence — New Trial Set Aside—Practice—Special Leave to Cross Appeal.]—*See* NEW TRIAL, 2.

LANDS.

Unjust Discrimination — Undue Preference—Similar Parties and Similar Conditions — Long and Short Haul—Cost of Operation and Maintenance—Natural Dividing Line—Water Competition.]—*See* DISCRIMINATION.

LANDS REQUIRED FOR RAILWAY.

See EXPROPRIATION, 1, 2, 3.

LIMITATION OF ACTION.

Fires — Damages Caused by Sparks—Canadian Pacific Railway Company's Charter.]—*See* FIRES, 2.

Timber Cut for Construction of Railway—Plans Not Filed.]—*See* TRESPASS BY RAILWAY.

LOCATION OF LINE.

1. *Priority of Approval — Registration — Ownership — Construction — Crossing — Seniority — Sections* 157, 159 *and* 160 *Railway Act.*]—The map shewing the location and the plan of a branch line of the applicant were approved under sections 157 and 159 and registered as required by section 160, Railway Act, prior to the respondent. The respondent owned in fee the land at the point of crossing of the two locations prior to the approval of any plans. The respondent's line at the point of crossing was built first and the railway was in operation when construction work upon the applicant's railway reached the crossing:—

Held, that the respondent was senior to the applicant at the crossing. *Canadian Northern Ry. Co.* v. *Canadian Pacific Ry. Co.*, 297.

2. *Priority of Approval — Ownership — Construction — Crossing — Seniority — 44 Vict. ch.* 1, *sec.* 14—3 *Edw. VII. ch.*

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7, *sec.* 46.] — The respondent, prior to the applicant, obtained approval of the location and proceeded with the construction of a branch line under 44 Vict. ch. 1, sec. 14. The applicant pending an application to cross said line, obtained a grant from the Crown (Dominion) of the land at the crossing pursuant to 3 Edw. VII. ch. 7, sec. 46:—

Held, that the respondent was senior to the applicant at the crossing.

In re Branch Lines, 36 S.C.R. 42, followed. *Grand Trunk Pacific Ry. Co.* v. *Canadian Pacific Ry. Co.*, 299.

LONG AND SHORT HAUL.

East and Westbound Rates—Discrimination Between Localities—Undue Preference—Cost of Operation and Maintenance—Water Competition.]—*See* DISCRIMINATION.

LORD CAMPBELL'S ACT.

Negligence — Contributory Negligence — Disobedience to Orders.]—*See* RAILWAY CROSSINGS, 2, 3.

Negligence—Breach of Statutory Duty — Common Employment.]—*See* WORKMEN'S COMPENSATION ACT.

MANDAMUS.

Shares — Transfer — Interlocutory Order.]—*See* TRANSFER OF SHARES.

MASTER AND SERVANT.

Insulation of Electric Wires—Onus of Proof—Duty of Employee.]—*See* NEGLIGENCE, 4.

Watchman at Crossing—Backing Train.]—*See* NEGLIGENCE, 7.

MISDIRECTION.

Private Way to Station — Highway — Sidewalk — Absence of Warning.]—*See* SIGNALS AT CROSSING, 2.

MUNICIPALITY.

Consent of — Railway Crossing on Highway—Approval of Plans—Jurisdiction of Board.]—*See* BOARD.

Highway Crossing — Protection at—Contribution to Cost of —Powers of Railway Committee.]—*See* CONSTITUTIONAL LAW, 2, 3.

Electric Railway — Construction Along Highway — Consent of Municipality — By-laws — Order of Board Authorizing Deviation.]—*See* HIGHWAY.

Gates and Watchmen—Public Parks—Injury to Person Crossing Track.]—*See* NEGLIGENCE, 1.

NEGLIGENCE.

1. *Municipal Corporation — Public Park—Gate and Watchman at Railway Crossing—Injury to Person Crossing Track.*]

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—Within a public park maintained and controlled by the defendants, a municipal corporation, they erected a gate near a railway crossing, and kept a watchman to open the gate when there was no danger from passing trains, and to close it when trains were approaching the crossing. The plaintiff, driving through the park, desiring to pass through the gate to the highway beyond the railway, and finding the gate open, took that as an intimation that no train was approaching, and attempted to cross the railway, when he was struck by a train and injured:—

Held, that the defendants owed him no duty, and were not liable in damages for his injuries. *Soulsby* v. *City of Toronto*, 65.

2. *Injury to Person Crossing Track—Crossing Not at Highway and Not Sanctioned by Board of Railway Commissioners — Negligence — Non-compliance with sections* 242 *and* 243 *of Railway Act, ch.* 37, *R.S.C.* 1906—*Fences at Crossing—Invitation to Public—Costs. Bird* v. *Canadian Pacific R.W. Co.*, 195.

3. *Street Railways — Accident —Evidence — Leaning Over to Expectorate.*]—The plaintiff, as a passenger, was, about midnight, standing on the back platform of one of the defendants' cars, smoking a cigar and leaning upon the railway gate or grating at the side, over which he leaned, from time to time, a distance from five to seven inches, and expectorated. Apparently, while doing so, he was struck by something and received the injuries complained of. The plaintiff alleged, in his statement of claim, that he was struck by a post belonging to the defendants and used by them for their trolley wire, but gave no evidence as to this. As a matter of fact, there were trolley poles along the line of the defendant railway on the side where the plaintiff was struck, but there was no evidence given by the plaintiff of their position, and the evidence for the defendants placed them about two feet from the overhang of the car:—

Held (reversing the judgment of the Divisional Court), that the plaintiff's action should be dismissed, as there was no evidence of what caused the injury; Meredith, J.A., dissenting.

Per Riddell, J. (in the Divisional Court):—While it is impossible to lay down any specific rule for the guidance of railways or street railways generally, a railway operating in a country in which tobacco chewing or gum chewing is not uncommon must expect its patrons, or some of them, to be tobacco and gum chewers, and if it be

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the custom of such passengers to put their heads past the lines of the car to expectorate, the railway should be held to know of such custom, and should either remove all obstructions from the side of the track a sufficient distance to avoid the probability of an accident, or prevent the passengers from projecting their heads over the side, or at least give proper warning as to the danger. And in every case the railway must take all reasonable precautions against an accident happening to one who is acting as in the ordinary course of affairs "in the vicinage" it may be expected that some will act. The Massachusetts rule that it is necessarily negligence for one riding in a railway car to project any portion of his person out of the window not followed by the Divisional Court. *Simpson* v. *Toronto and York Radial R.W. Co.*, 218.

4. *Master and Servant—Duty of Employee — Insulation of Electric Wires—Onus of Proof.*] —An electric line foreman in the company's employ met his death from contact with imperfectly insulated live wires while at work in proximity to them in the power-house. The evidence left doubt whether the duties of deceased included the inspection and care of the wires both inside and outside of the power-house, or whether his engagement was to perform the duties in question in respect only to the wires outside the power-house walls:—

Held, that the onus of proof as to the point in dispute was on the defendants and, such onus not having been satisfied, they were liable in damages.

Judgment appealed from affirmed, Davies, J., dissenting, on a different view of the evidence in holding that the duties of deceased included inspection and care of the interior wiring. *Quebec Railway, Light and Power Co.* v. *Fortin*, 252.

5. *Contributory Negligence — Highway Crossing—Findings of Jury — Nonsuit — Section* 224, *Railway Act*, 1903.]—The defendants' railway ran east and west through the plaintiff's farm. The dwelling house was on a hill about 330 feet north of the railway track and standing about twenty feet from the highway leading to and across the railway track. There was nothing to obstruct the view in coming from the plaintiff's house to the crossing for a considerable distance on either side. The down grade of the highway is very slight for the last forty or fifty feet from the track.

The morning train coming from Elora, west of the plaintiff's farm, due to cross the highway three or four minutes before nine A.M., was eight minutes late on the morning in question.

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The plaintiff before leaving his house that morning saw that it was ten or fifteen minutes after nine and concluded that the train must have passed without any one noticing it. In two or three minutes he heard a long whistle denoting a whistle for a station which he concluded was for Belwood Station, distant three miles to the north-east and therefore thought the train had passed over the highway at his farm. The whistle he heard, however, was to the south-west as there was no other train on the line and it passed across the highway a few minutes later. Shortly after this his son Byron, who intended going to a farm owned by the plaintiff across the railway track asked his father if the train had passed, who replied it must have passed, as it was nearly fifteen minutes past nine when he left the house. Byron then went into the house and left it with his brother James, a lad of twelve years old, to cross the railway track.

A few minutes after Byron had left the plaintiff was standing near the barn, beside the house, when he heard the train rush eastward through the mist, but he heard no whistle or bell.

The morning was foggy and the plaintiff stated a person could not see an object at a greater distance than 37 yards.

After the accident the plaintiff was notified and at once went to the crossing where he found Byron on the eastern half of the highway about two feet from the north rail of the track. He was taken home and died shortly afterwards, remaining perfectly conscious meanwhile.

According to the statement of the deceased, made to his father, he was some yards from the track when he heard the noise of the train and the steam from the engine as it passed, but was unable to stop and was struck by the step of the last coach.

A motion for a nonsuit at the close of the plaintiff's case was refused and the jury brought in a verdict for $2,000 in favour of the plaintiff, finding the defendants guilty of negligence in not giving the statutory signals—that the injury was caused by the defendants' negligence—and that the deceased was not guilty of negligence and could not by the exercise of reasonable care have avoided the accident.

The Divisional Court dismissed the defendants' appeal, holding that the case could not have been withdrawn from the jury. MacMahon, J., dissenting, held that on the admission made by the deceased that he heard the train coming and did not stop, or could not stop, there was nothing to be left to the jury and the motion for nonsuit should have prevailed.

The Court of Appeal allowed

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the defendants' appeal and dismissed the action.

Per Osler, J.A., agreeing with MacMahon, J.:—The deceased according to the evidence was the author of his own injury, the accident could only be attributed to his negligence, and not to the negligence of the defendants in omitting, if they did omit, to sound the bell or whistle.

Per Meredith, J.A.: — The plaintiff should not have been nonsuited, but there was no reasonable evidence upon which the jury could find that there was not contributory negligence. The evidence shewed that the deceased was to have the farm on the father's death, in the meantime they were to be partners, and the son was to get what he needed out of the common fund, the plaintiff has proved no pecuniary loss and the action must fail on that ground also. *Moir* v. *Canadian Pacific R.W. Co.*, 380.

6. *Contributory Negligence—Highway Crossing—Findings of Jury — Nonsuit — Section* 274 *Railway Act, R.S.C. ch.* 37.]— In an action to recover damages for the death of a man who was struck by a train of the defendants at a highway crossing where the evidence for the plaintiff shewed at most a total absence of warning, but there was not at the close of the whole case, any evidence upon which the jury, acting reasonably, could find that the absence of warnings caused, or in the slightest degree contributed to the accident, which the undisputed evidence shewed was wholly due to the reckless conduct of the deceased in attempting to cross after he became fully aware of the approaching train:—

Held, reversing the judgment at the trial, that the case should not have been submitted to the jury, but the action should have been dismissed.

In such cases, the facts, if in dispute, must be found by the jury, but the Judge must first rule as a matter of law whether there is any evidence from which the inference necessary to support the plaintiff's case can reasonably be drawn, if there is no such evidence, the plaintiff's case fails.

The statutory signals required to be given by section 274 of the Railway Act, R.S.C., ch. 37, are intended to warn persons likely to be in danger. If not given there is a presumption of safety upon which a reasonable person may act, and if, while so acting he is injured the company may be liable, but he can not, because no warning had been given, proceed to cross in front of an advancing engine which he sees or hears and then blame the absence of warnings for his injury.

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Hanna v. *Canadian Pacific R.W. Co.*, 392.

7. *Accident to Employee — Watchman at Crossing—Backing Train — Negligence — Liability — Railway Act — R.S.C.* 1906, *ch.* 37, *sec.* 276.] — A watchman of the defendant company at a certain crossing in a city was killed by two cars being "kicked off" in the usual way from a train which was backing in an easterly direction for that purpose. A brakeman with a lamp was on top of the westernmost of the two cars, but was not keeping a look-out, and gave no warning that the cars were moving. There was no light on the crossing, nor was any one stationed on the cars "kicked off," to warn people, and the engine bell was ringing:—

Held, that the defendants were guilty of negligence and were liable for his death, not having complied with section 276 of the Railway Act, R.S.C. 1906, ch. 37, by stationing a person on the front car to warn people.

Although the deceased was an employee of the defendants and it was his duty to protect persons crossing the track from the cars, he had a right to rely, so far as his own safety was concerned, on nothing being done to expose him to unnecessary danger, and on the above section being complied with.

Canadian Pacific R.W. Co. v. *Boisseau* (1902), 32 S.C.R. 424, followed. *Lamond* v. *Grand Trunk R.W. Co.*, 401.

8. *Operation of Railway — Yard Siding — Sloping Station Platfrom — Private Passage — Dangerous Way — Negligence — Procedure at Trial — Misdirection — Objections to Charge to Jury—Practice.*]—Where, on a specific objection to his charge, the trial Judge recalled the jury and directed them as requested, the contention that the directions thus given were erroneous should not be entertained on an appeal. *Canadian Pacific R.W. Co.* v. *Hansen*, 441.

Cattle Straying — Wilful Act or Omission of Owner — Contributory Negligence.] — *See* CATTLE AT LARGE, 6.

Fires—Obligation of Railway —Combustibles Left on Right of Way—Judge's Charge—Verdict —New Trial.]—*See* FIRES, 1.

Fires—Sparks from Engine—Limitation of Action—Canadian Pacific Railway Company's charter.]—*See* FIRES, 2.

Master and Servant—Insulation of Electric Wires.]—*See* NEGLIGENCE, 4.

Contributory Negligence — Question in issue—Non-disposal of.]—*See* NEW TRIAL, 3.

Collision Between Trains — Disobedience to Orders—Signals

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— *Contributory Negligence — Lord Campbell's Act.*] — *See* RAILWAY CROSSING, 2, 3.

Contributory Negligence — Signals at Crossing—Speed of Train Within City Limits — Onus of Proof.]—*See* SIGNALS AT CROSSING, 1.

Contributory Negligence — Private Way to Station—Signals for — Jury — Misdirection — New Trial.]—*See* SIGNALS AT *Crossing*, 2.

Breach of Statutory Duty—Common Employment — Fatal Injuries Act.]—*See* WORKMEN'S COMPENSATION ACT.

NEW TRIAL.

1. *Misdirection — Charge to Jury—Objection at Trial.*]—Appeal allowed from the judgment of the Divisional Court, reported 13 O.L.R. 423, granting a new trial.

Per Osler, J.A.:—There is no hard and fast rule which absolutely prohibits the Court from entertaining an objection on the ground of misdirection when the party has omitted to take it at the trial. *Brenner* v. *Toronto R.W. Co.*, 210.

2. *Verdict of Jury Upheld—Evidence Properly submitted—Order Granting New Trial Set Aside—Practice—Special Leave to Cross Appeal Nunc Pro Tunc.*]—In an action for damages against the appellants for loss of life occasioned by the negligent management of their tramcar by their servant employed to drive it, the jury found that the servant was guilty of negligence in causing the accident and that the deceased was not guilty of contributory negligence, and judgment was accordingly entered for the plaintiffs:—

Held, that the Court in appeal from that judgment was in error in setting it aside and ordering a new trial, there having been evidence on both issues properly submitted to the jury. It is not valid ground for ordering a new trial that the Judges differ from the conclusion at which the jury have arrived or consider that the findings shew that the defendants had not had a fair and unprejudiced trial. Special leave to the respondents to cross appeal against the order for a new trial granted *nunc pro tunc;* the appeal praying that the action should be dismissed. *Toronto R.W. Co.* v. *King*, 408.

3. *Accident — Negligence — Contributory Negligence — Non-disposal of — Questions in Issue —New Trial.*]—The deceased, in attempting to cross over one of the streets of a city on which there were street car lines, passed behind one of the cars, and was just stepping on to the track on which cars coming in

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the opposite direction ran, when she fell and was struck by an approaching car and killed. In an action brought to recover damages therefor, the jury, while finding that there was negligence on the defendants' part in running at too high a rate of speed, and that there was contributory negligence on the plaintiff's part in not taking proper precautions before attempting to cross, also found that the defendants could have avoided the accident had the car been running at a reasonable rate of speed. Upon their answers judgment was entered for the plaintiff:—

Held, Garrow, J., dissenting, that on these findings, the judgment could not be supported, and a new trial was directed. *Hinsley* v. *London Street R.W. Co.*, 419.

Fires — Negligence — Evidence — Combustibles Left on Right of Way—Judge's Charge —New Evidence on Appeal.]—*See* FIRES, 1.

Jury — Misdirection — Negligence — Proximate Cause.]—*See* SIGNALS AT CROSSING, 2.

NONSUIT.

Highway Crossing—Signals at — Contributory Negligence — Findings of Jury.]—*See* NEGLIGENCE, 5, 6.

NORTH-WEST TERRITORIES.

Prairie Fires Ordnance—Constitutionality—Effect of Dominion Railway Act.]—*See* CONSTITUTIONAL LAW, 1.

NOTICE OF LOSS.

Condition Limiting Liability —Carriers of Goods.]—*See* CARRIERS.

PASSENGERS.

Through Rates—Joint Tariffs —Continuous Route—Competitive and Non-competitive Points.]—*See* TARIFFS, 2.

PASSENGER TRAFFIC.

Third-class Fares — Grand Trunk Railway Company — Construction of Statute.]—*See* TOLLS.

PLANS.

Railway Crossing on Highway —Approval of — Protective Appliances — Apportionment of Cost—Jurisdiction of Board.]—*See* BOARD.

Electric Railway — Construction on Highway—Deviation of Line—Order of Board Authorizing.]—*See* HIGHWAYS.

Approval — Priority—Registration.] — *See* LOCATION OF LINE, 1.

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Not Filed — Timber Cut for Construction — Limitation of Actions.] — *See* TRESPASS BY RAILWAY.

PRACTICE.

Warrant of Possession — Cost of.]—*See* COSTS.

Verdict at Trial — Misdirection — Objections to Charge.]—*See* NEGLIGENCE, 8.

Misdirection—Charge to Jury — Objections at Trial.] — *See* NEW TRIAL, 1.

PRAIRIE FIRES ORDNANCE.

Constitutionality of—Fires — Operation of Dominion Railway.] — *See* CONSTITUTIONAL LAW, 1.

PRIVATE ROAD.

Dangerous Way — Yard Siding — Sloping Platform.]—*See* NEGLIGENCE, 8.

Fences at Station — Sidewalk —Absence of Warning at.]—*See* SIGNALS AT CROSSING, 2.

PRIVY COUNCIL.

Appeal to—Verdict Upheld—New Trial Set Aside — Special Leave to Cross Appeal.] — *See* NEW TRIAL, 2.

PROTECTION OF CROSSING.

Contribution to Cost — Municipality — Liability for.]—*See* HIGHWAY CROSSING, 1, 2.

RAILWAY CROSSING.

1. *Double Track — Priority—Expense of Making and Protecting Crossing*—8 *Vict. ch.* 25 —14-15 *Vict. ch.* 51, *sec.* 6—18 *Vict. ch.* 33, *Railway Act, sec.* 227—*Senior and Junior Companies.*] — A railway company having the right, under its charter to construct one or more sets of tracks becomes the senior company not only when its line is crossed by the line of a junior company, but also in respect of the crossing of any additional tracks subsequently laid by it, and the junior company must bear the expense of making and protecting all such crossings, as new tracks are laid by the senior company:—

Held, that under the circumstances of this case, the United Counties Ry. Co. should bear the expense of protecting the crossing of its line by the intended double track of the Grand Trunk Ry. Co. *Grand Trunk Ry. Co.* v. *United Counties Ry. Co.*, 294.

2. *Collision Between Railway Trains—Disobedience to Orders — Signals — Negligence — Contributory Negligence — Railway Act, secs.* 277, 278—*Lord Campbell's Act.*] — John McKay, a locomotive engineer in the employ of the Canadian Pacific R.W. Co., was killed in a collision between trains of the Cana-

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dian Pacific and defendant railway companies.

An action was brought by his widow against the Wabash Company claiming damages under Lord Campbell's Act.

McKay before attempting to cross brought his train to a full stop, but not at the stop-board, as required by the rules of the railway company and proceeded slowly when the signals indicated the crossing was clear, thus complying with the Railway Act, secs. 277, 278.

The Wabash train on the other hand, without coming to a full stop although the signals were against it, attempted to make the crossing at the speed, according to the jury, at "the diamond" of eight or nine miles an hour.

The real cause of the accident was the reckless disregard of the statute by the defendant's employees in charge of the train:—

Held, Meredith, J.A., dissenting, that on the answers of the jury the defendant company was liable in damages for the accident. *McKay* v. *Wabash R.W. Co.*, 444.

3. *Collision—Stop at Crossing — Statutory Rule — Company's Rule — Contributory Negligence —R.S.C.* 1906, *ch.* 37, *sec.* 278.] —A train of the Wabash Railroad Co. and one of the C.P.R. Co. approached a highway crossing at obtuse angles. The former did not, as required by section 278 of the Railway Act, come to a full stop; the latter did at a semaphore nearly 900 feet from the crossing and receiving the proper signal proceeded without stopping again at a "stop post" some 400 feet nearer where a rule of the company required trains to stop. The trains collided and the engineer of the C.P. Ry. Co. was killed. In an action by his widow:—

Held, that the failure of the engineer to stop the second time was not contributory negligence which prevented the recovery of damages for the loss of plaintiff's husband caused by the admitted negligence of defendants. *Wabash R.W. Co.* v. *McKay,* 466.

Highway—Approval of Plans —Leave of Board and Municipality—Protective Appliances—Apportionment of Cost—Jurisdiction.]—*See* BOARD.

Plans — Approval of — Priority.]—*See* LOCATION OF LINE, 1.

SHARES.

Transfer — Mandamus — Interlocutory Order.]—*See* TRANSFER OF SHARES.

SIDING.

Private Passage Across—Station Platform — Dangerous Way.]—*See* NEGLIGENCE, 8.

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SIGNALS AT CROSSING.

1. *Destruction of Horses by Engine at Crossing—Negligence — Contributory Negligence — Railway Act*, 1903, *sec.* 224—*Conflicting Evidence as to Blowing Whistle—Failure to Ring Bell — Neglect of Persons in Charge of Horses to Look out for Train — Occurrence Within City Limits — Exception in Statute—Failure of Evidence to Negative.*]—An accident having occurred upon a highway crossing in the City of Winnipeg and there having been some evidence of neglect on the defendants' part the plaintiff would have been entitled to recover but for his failure to shew under section 224 of the Railway Act, 1903, that there was no by-law of the City of Winnipeg prohibiting the defendants from sounding the whistle and ringing the bell, the onus being upon the plaintiff to prove the non-existence of such by-law. *Pedlar* v. *Canadian Pacific R.W. Co.*, 1.

2. *Injury to Person by Train — Negligence — Contributory Negligence — Omission to Give Warning of Approach — Sidewalk—Way of Access to Station — Highway — Jury — Misdirection — New Trial — Prime Cause.*] — The plaintiff a contractor for supplying milk to the defendants' dining cars after having delivered the milk in the freight shed was returning with the empty milk cans as was his usual practice.

He was proceeding around the south-west corner of the station down a sloping platform at a run when just at that time a train on the shunting track which he had to cross arrived a short distance north of the sloping platform and the sidewalk which lead from it across the track. The plaintiff fell and the hind trucks of the nearest car passed over his foot:—

Held, 1. That the sloping platform was a dangerous way under the circumstances and its structure in that way negligent.

2. The omission to ring a bell or blow a whistle or give some other proper signal to indicate the approach of the train, and that the engine was backing down the shunting track at an excessive and dangerous rate of speed were acts of negligence.

3. The proximate cause of the accident was not the heedlessness of the plaintiff in running, but the dangerous character of the sloping platform which prevented him from avoiding the accident when he perceived his danger. *Hansen* v. *Canadian Pacific R.W. Co.*, 429.

Highway Crossing—Contributory Negligence — Findings of Jury — Nonsuit.]—*See* NEGLIGENCE, 5, 6.

Collision — Disobedience to Orders — Negligence — Con-

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tributory Negligence.] — *See* RAILWAY CROSSINGS, 2, 3.

STANDARD PASSENGER TARIFFS.

Special Passenger Rates — Contracts for — Breach — Recovery of Amount Overpaid,]— *See* TARIFFS, 1.

STATION.

Platform at—Yard Siding — Private Passage — Dangerous Way.]—*See* NEGLIGENCE, 8.

STATUTES.

8 Vict. ch. 25, p. 294
14-15 Vict. ch. 51, sec. 6, p. 294
16 Vict. ch. 37, sec. 3 (D.), p. 267
18 Vict, ch. 33, p. 294
23 Vict. ch. 96, p. 109
44 Vict. ch. 1, sec. 14(D.), p. 299.
51 Vict. ch. 29, secs. 187, 188(D.), p. 282
sec. 232, p. 125
60-61 Vict. ch. 5, sec. 1 (D.), p. 125
2 Edw. VII. ch. 9 (O), p. 109
3 Edw. VII. ch. 7, sec. 46(D.), p. 299
4 Edw. VII. ch. 31(D.), p. 472
6 Edw. VII. ch. 184 (D.), p. 109
7 Edw. VII. ch. 37 (O.), p. 109
British North America Act—
sec. 91 (29), pp. 282, 472
sec. 92 (10*a*), pp. 282, 472
North-West Territories Act (1898)—
ch. 87, sec. 2, p. 176
(1903) ch. 25, sec. 30, p. 176
R.S.O. (1897) ch. 207, sec. 42, p. 156
ch. 209, p. 109
R.S.N.S. (1900)ch. 99, sec. 251, p.198
Railway Act, 1903—
sec. 118(j), p. 150.
sec. 139, p. 90
sec. 153, p. 90
sec. 161, p. 336
sec. 186, pp. 96, 109
sec. 193, p. 257
sec. 199, pp. 17, 34
sec. 217, p. 257
sec. 219 (1), p. 257
sec. 224, pp. 1, 380
sec. 237(4), pp. 4, 23, 29, 34, 41, 351
sec. 239, p. 150
sec. 254, p. 355
sec. 294, p. 355
sec. 427, p. 355
Railway Act, 1906—
sec. 20, p. 96
sec. 26, p. 109
sec. 29, p. 90
sec. 59, p. 73
sec. 151(j), p. 150
sec. 157, p. 297
sec. 159(D.), pp. 109, 297
sec. 160, p. 297
secs. 172, 174, 175, 176, pp. 109, 302
secs. 183, 184, p. 71
sec. 192, p. 90
sec. 227, pp. 109, 295
sec. 235, pp. 96, 109
sec. 237, pp. 79, 109
secs. 242, 243, p. 195
sec. 254, pp. 17, 354
sec. 274, p. 392
sec. 276, p. 401
secs. 277, 278, pp. 444, 466
sec. 294, p. 17
sec. 297, p. 150
sec. 317, p. 289
sec. 329, p. 302
secs. 333, 334, pp. 289, 302

SUPREME COURT.

Negligence — Fires—Judge's Charge—New Trial—Admitting

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New Evidence on Appeal.]—*See* FIRES, 1.

TARIFFS.

1. *Contract for Special Passenger Rates for Delegates to Convention — Breach—Validity of Contract — Standard Passenger Tariff not Filed and Approved — Railway Act — Construction—Recovery of Amount Overpaid.*]—A railway company agreed with a lodge to give reduced excursion rates, provided a certain number took advantage of them; but these rates were not approved by the Board of Railway Commissioners under the Railway Act, 1906, sec. 331. On the return trip the railway company refused to grant the reduced rate and collected full fare. In an action to recover the amount overpaid:—

Held (following *Lees* v. *Ottawa & New York R.W. Co.*, 31 O.R. 567), that notwithstanding the absence of approval of the rate under section 331 of the Railway Act, the amount overpaid could be recovered. *Grand Lodge of Knights of Pythias* v. *Great Northern R.W. Co.*, 263.

2. *Facilities for Passenger Business — Through Rates — Joint Tariffs—Continuous Route —Competitive and Non-competitive Points—Railway Act, secs.* 317, 333 *and* 334.]—The Canadian Northern Ontario Railway Company applied to the Board for an order under sec. 317 of the Railway Act, directing the Grand Trunk and the Canadian Pacific Ry. Cos. to provide facilities for passengers desiring to travel from or through points on the lines of the respondent companies, or either of them, to points on the lines of the applicant and its connections and to issue tickets at through rates accordingly, the application covering points in Canada and the United States.

The object of the application was to oblige the respondent companies to transfer to it at Toronto passengers desiring to reach the Muskoka district which is served by the lines of the three companies. The applicant has no connections east or west of Toronto, but Toronto may be reached from the United States by steamer from the Niagara frontier during the summer months.

As to competitive points:—*Held*, 1. That it has not been shewn that any "obstruction is offered to the public desirous of using such railways as a continuous line of communication" within sub-section 4 of section 317.

2. That the arrangement between the respondents has not been shewn to constitute an undue or an unreasonable preference as against the applicant nor to be to the public disadvantage.

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3. That a change for the pecuniary benefit of the applicant is not, of itself, a sufficient reason for granting the application.

Without deciding that section 317 applies only to non-competitive points:—*Held*, 1. That joint fares and rates should be established on joint traffic from non-competitive points destined to points common to the applicant's and respondents' lines.

2. That the other requests in the application should be refused. *Canadian Northern Ontario Ry. Co.* v. *Grand Trunk and Canadian Pacific Ry. Cos.*, 289.

3. *Competitive and Non-competitive Traffic — Interswitching — Contracting Carrier — Tariff Rates — Joint Tariffs — Basis of Joint Rates—Refund — Railway Act, secs.* 176, 329, 333, 334.]— Upon complaints by shippers and consignees at various points as to the practice of adding to the tariff rates of the railway company carrying to a particular place the switching charge of another company to which the traffic is transferred for carriage and delivery at another point in or near the same place, and in cases of such transfer absorbing these extra charges where the traffic originates at competitive points (*i.e.*, competitive traffic), while adding the charges when the point of origin is non-competitive (*i.e.*, non-competitive traffic) :—

Held, 1. That a railway company's tariffs to and from particular places should, in the absence of indication to the contrary, be read as covering only traffic originating at and for delivery upon its own tracks and connecting sidings within its own terminals, and not as including traffic originating at or for delivery at or near the same places upon the lines of another carrier.

2. That a reasonable additional rate should be payable for switching (*i.e.*, the service for the short carriage on receipt or delivery).

3. That while the company carrying such traffic for the long distance should not be obliged to absorb the whole of such switching charge, it may not necessarily be debarred from absorbing the whole of such charges, provided this does not involve unjust discrimination or preference and in case of competitive traffic it may do so.

4. *Held*, also, that two such companies may be required to treat such traffic as joint traffic and to establish tariffs therefor under Railway Act, sec. 333, and the joint rate may be less than the sum of the two rates, and each or one of the companies required to accept less than its full rates.

It had long been the practice of two railway companies to absorb switching charges in respect of traffic upon their respective

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lines to and from Toronto received or delivered on the line of the other (in respect of non-competitive freight). Without any change of tariffs this practice was recently abandoned and the switching charges added to the regular tariff rates. This practice, it was shewn, originated upon the construction of the junior company's lines into Toronto, when it had to receive or deliver its traffic wholly or mainly upon the tracks of the senior company and was practically compelled to bear the switching charges therefor. As the junior company established and enlarged its terminals, and acquired industrial sidings, the senior company followed the same practice. Upon complaint being made of this change and an application for a refund of such charges:—

Held, that although the continuance of the practice afforded some evidence of its reasonableness it was not conclusive, that an exception could not be made in the case of Toronto, that the two companies were not bound to continue the practice and all claims for refunds should be disallowed.

Laning-Harris Coal & Grain Co. v. *A. T. & S. F. R. Co.*, 12 I.C.C. Rep. 479, *Leonard* v. *C. M. & St. P. R. Co.*, 12 I.C.C. Rep. 492, *London Interswitching Case*, 6 Can. Ry. Cas. 327, followed.

Upon the report of the Chief Traffic Officer the Board fixed the basis of such joint switching rates and ordered, dividing non-competitive traffic into two classes, that (1) for switching performed upon orders of the shipper or consignee after the shipment has reached the terminal of the contracting carrier, the additional toll should not be more than 20 cents per ton for any distance not over 4 miles, with a minimum of $3 and a maximum of $8 per car, the whole of such charge being paid by the shipper or consignee; and (2) where the traffic is so consigned by the shipper as to indicate and involve service by another company at the time of shipment then the consignee or shipper should only be charged with 50 per cent. of such charges.

An order of the Board defining "interswitching" and "contracting carrier" and embodying the above basis was issued. *Canadian Manufacturers' Association* v. *Canadian Freight Association*, 302.

TENANT.

Cattle Killed at Crossing—Negligence — Special Agreement.]—*See* CATTLE AT LARGE, 1.

TENANT FOR LIFE.

Conveyance by — Infant Remainderman — Order Authoriz-

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ing—Costs—Lands Required for Railway—Expropriation.]—*See* EXPROPRIATION, 1.

TOLLS.

Grand Trunk Railway of Canada — Passenger Tolls — Third-class Fares—Construction of Statutes — Repeal — 16 *Vict. ch.* 37, *sec.* 3 (*Can.*)—*Amendments by Subsequent Railway Legislation.*]—The legislation by the late Province of Canada and the Parliament of Canada since the enactment of section 3 of the statute of Canada, 16 Vict. ch. 37, in 1852, has not expressly or by implication repealed the provisions of that section requiring third-class passenger carriages to be run every day upon the line of the Grand Trunk Railway of Canada, between Toronto and Montreal, on which the fare or charge for each third-class passenger shall not exceed one penny currency for each mile travelled. *Grand Trunk R.W. Co.* v. *Robertson*, 267.

TRAFFIC.

Interswitching—Joint Tariffs —Refund — Joint Rates.]—*See* TARIFFS, 3.

TRAIN MOVING BACKWARD.

Highway Crossing — Watchman at — Master and Servant.] —*See* NEGLIGENCE, 7.

TRANSFER OF SHARES.

Company — Shares — Transfer on Company's Books—Mandamus to Enforce Transfer—Interlocutory Order.]—The owner of two shares of stock in the defendants' railway, assigned them to the plaintiff, endorsing the assignment on the certificate. The plaintiff called at the head office and demanded that the necessary transfer should be made on the company's books, and also saw the President; and after some correspondence, the transfer not having been made, he procured a duplicate assignment of the stock, and placed the matter in the hands of his solicitor, who thereupon wrote the company demanding a transfer, and enclosed one of the duplicate assignments, and stated that he would attend on a named hour, ready to surrender the certificate, and have the transfer completed, and, on receiving a reply that it could not then be attended to, this action was brought, in which an order for a mandamus was claimed.

An interlocutory order made by a Judge in Chambers directing a mandamus to issue, was, on appeal to the Divisional Court, set aside, and the matter left for decision at the trial. *Nelles* v. *Windsor, Essex and Lake Shore Rapid R.W. Co.*, 367.

TRESPASS BY RAILWAY.

Damages "Sustained by Reason of the Railway" — Timber

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Cut for Construction — Trespass — Limitation of Actions— Plans not Filed.]—The defendants the railway commission were incorporated by 2 Edw. VII. ch. 9 (O.), which provides, by section 8, that they shall have in respect of the railway all the powers, rights, remedies, and immunities conferred upon any railway company by the Railway Act of Ontario. The latter Act, R.S.O. 1897, ch. 207, sec. 42, provides that "all actions for indemnity for damages or injury sustained *by reason of the railway,* shall be instituted within six months next after the time of the supposed damage sustained." The defendants (the railway commission and a contractor under them), before the filing of the plans of the railway, and in the course of constructing it, entered upon the timber limits of the plaintiffs and cut timber for construction purposes. These acts ceased much more than six months before the commencement of this action, brought to recover damages for the trespass and for the value of the timber:—

Held, following *McArthur* v. *Northern and Pacific Junction R.W. Co.* (1888-90), 15 O.R. 733, 17 A.R. 86, that the plaintiff's claim was for damages sustained by reason of the railway, and was barred by the statute; and it made no difference that the commission had not filed the plans of their railway or taken the necessary steps to compensate those whose lands or interests they entered upon or affected. *Lumsden et al.* v. *Temiskaming and Northern Ontario Railway Commission et al.*, 156.

Cattle Killed on Track—Liability to Fence — Adjoining Owner.]—*See* CATTLE AT LARGE, 2, 3.

TRIAL.

Verdict at — Misdirection — Objections to Charge.] — *See* NEGLIGENCE, 8.

UNDUE PREFERENCE.

Discrimination Between Localities—Similar Parties and Conditions—Long and Short Haul —Cost of Operation and Maintenance — Main Line — Water Competition.]—*See* DISCRIMINATION.

VERDICT.

Fires—Judge's Charge —New Trial—Admitting New Evidence on Appeal.]—*See* FIRES, 1.

WARRANT OF POSSESSION.

Costs of — Practice.] — *See* COSTS.

WATCHMEN.

Disobedience to Orders—Signals — Negligence — Contributory Negligence.]—*See* RAILWAY CROSSING, 2. 3.

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WATER COMPETITION.

East and Westbound Rates—Discrimination Between Localities—Undue Preference—Long and Short Haul—Cost of Operation and Maintenance — Main Line.]—*See* DISCRIMINATION.

WORKMEN'S COMPENSATION ACT.

Negligence—Railway—Breach of Statutory Duty — Common Employment—Nova Scotia Ry. Act, R.S.N.S. 1900, *ch.* 99, *sec.* 251—*Employers' Liability Act —Fatal Injuries Act.*]—Section 251 of the Railway Act of Nova Scotia provides that when a train is moving reversely in a city, town or village the company shall station a person on the last car to warn persons standing on or crossing the track, of its approach and provides a penalty for violation of such provision:—

Held, that this enactment is for the protection of servants of the company standing on or crossing the track as well as of other persons.

M. was killed by a train, consisting of an engine and coal car, which was moving reversely in North Sydney. No person was stationed on the last car to give warning of its approach and as the bell was encrusted with snow and ice it could not be heard. Evidence was given that on a train of the kind the conductor was supposed to act as brakesman and would have to be on the rear of the coal-car to work the brakes, but when the car struck M., who was engaged at the time in keeping the track clear of snow, the conductor was in the cab of the engine:—

Held, Idington, J., dissenting, that an absolute duty was cast on the company by the statute to station a person on the last car to warn workmen, as well as other persons, on the track which, under the facts proved, they had neglected to discharge. The defence under the doctrine of common employment was, therefore, not open to them. *Groves* v. *Wimborne,* [1898] 2 Q.B. 402, followed:—

Held, per Idington, J., that the evidence shewed the only failure of the company to comply with the statutory provision to have been through the acts and omissions of the fellow-servants of deceased; that the company, therefore, could not be held liable for the consequences under the Fatal Injuries Act; that it is, therefore, unnecessary to determine the applicability of the said section of the Railway Act, as the fellow-servants were guilty of common law negligence which rendered the company liable but only by virtue of and within the limits of the Employers' Liability Act. *McMullin* v. *Nova Scotia Steel & Coal Co.,* 198.

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INDEX TO NOTES.

Action of mandamus.....373, 374
Board, power to order highway crossing..... 89
Order approving form of contract..... 379
Bonds, registration of bondholders..... 374
British Columbia Animals Act..... 64
British Columbia Fences Act..... 64
Carrier, contract limiting liability.....340, 378, 379
Cattle at large.....34, 64, 366
Compensation for lands taken, roadway in lieu of money 343, 344
Condition limiting liability.....378, 379
Notice of loss of goods.....378, 379
Order of Board approving.....378, 379
Negligence of railway affecting.....378, 379
Contract limiting liability..... 378
Approval by Board 379
Expropriation of lands, temporary or permanent.....343, 344
Fences, cattle at large.....34, 64, 366
Highway, extension by railway, order of Board..... 89
Highway crossing, consent of municipality..... 89
Construction across railway 89
Mandamus to compel transfer of shares.....373, 374
Meeting of shareholders..... 374
Municipality, consent to highway crossing..... 89
Negligence, cattle escaping, defective fences..... 366
Invalidating condition limiting liability.....379, 380
Notice of loss of goods, necessity for.....378, 379
Prerogative mandamus, writ of 373, 374
Registration of bondholders 374
Shares, transfer of 373
Transfer of shares 373

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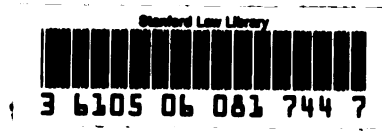

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